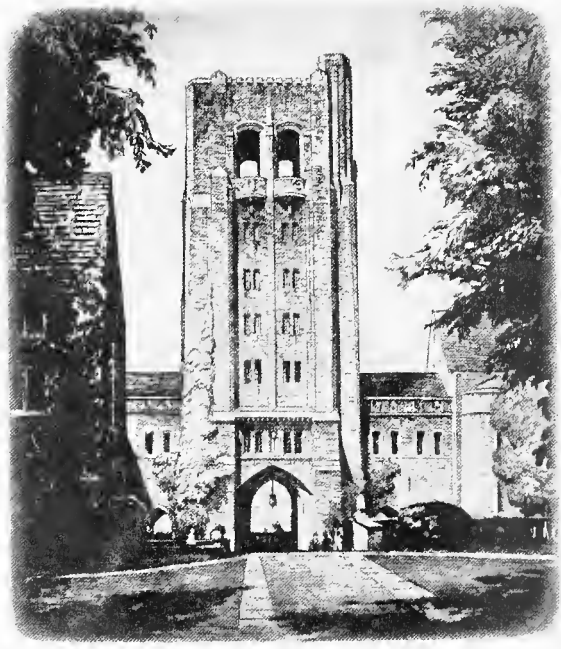

OUTLINES OF LECTURES
ON
JURISPRUDENCE

BY
ROSCOE POUND

SECOND EDITION

CAMBRIDGE
1914

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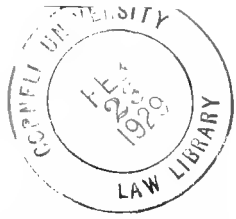
NOTE

As a number of editions of Holland's Jurisprudence are in common use, it is not advisable to cite pages in referring to that work. Unfortunately, the paragraphs are not numbered. I have attempted to point out the particular portions of the text referred to in such a way that any edition may be used.



OUTLINE OF THE COURSE

1. JURISPRUDENCE.
   - I. What is jurisprudence?
   - II. History of jurisprudence: schools of jurists.

2. THE END OF LAW.
   - III. Theories of justice.

3. THE NATURE OF LAW.
   - IV. Theories of law.
   - V. The nature of law.
   - VI. Law and ethics.
   - VII. Law and the state.
   - VIII. Justice according to law.

4. THE SCOPE AND SUBJECT-MATTER OF LAW.
   - IX. Interests.
   - X. The securing of interests.

5. SOURCES, FORMS, MODES OF GROWTH.
   - XI. Sources and forms of law.
   - XII. The traditional element.
   - XIII. The imperative element.
   - XIV. Codification.

6. APPLICATION AND ENFORCEMENT OF LAW.
   - XV. Application and enforcement of law.

7. ANALYSIS OF FUNDAMENTAL CONCEPTIONS.
   - XVI. Rights.
   - XVII. Powers.
   - XVIII. Privileges.
   - XIX. Duties and liabilities
   - XX. Relations.
   - XXI. Persons.
   - XXII. Acts.
   - XXIII. Things.

THEORY OF LAW AND LEGISLATION

1

JURISPRUDENCE

I. WHAT IS JURISPRUDENCE?

Holland, Jurisprudence, Chap. 1; Salmond, Jurisprudence, §§ 1–4; Gray, The Nature and Sources of the Law, §§ 288–321; Amos, Science of Law, Chap. 2; Austin, Jurisprudence (Student's Edition), Lect. 11; Lee, Historical Jurisprudence, 6–11; Bryce, Studies in History and Jurisprudence, Essay XII; Pollock, Essays in Jurisprudence and Ethics, Essay 1; Gareis, Science of Law (Kocourek's transl.), § 3; Korkunov, General Theory of Law (Hastings' transl.), §§ 2–4; Brown, The Austinian Theory of Law, §§ 640–669.

A developed system of law may be looked at from four points of view:

1. *Analytical.* — Examination of its structure, subject-matter and rules in order to reach its principles and theories by analysis.

2. *Historical.* — Investigation of the historical origin and development of the system and of its institutions and doctrines.

3. *Philosophical.* — Study of the philosophical bases of its institutions and doctrines.

4. *Sociological* — Study of the system functionally as a social mechanism and of its institutions and doctrines with respect to the social ends to be served.

Applied to the study of legal systems generally, these methods are called the "methods of jurisprudence." The propriety of naming a comparative method as a method of jurisprudence may

be doubted. The analytical, historical and philosophical methods, as methods of jurisprudence, must be comparative. When these methods are applied in the study of any particular system, the mode of treatment may be *dogmatic*, the practical exposition of its principles and rules, or *critical*, consideration of what its principles and rules ought to be in the light of analysis, history, philosophy and the social ends to be served. On this side, sociological jurists insist that account must be taken of all the social sciences.

There are a number of good introductions to the science of law in German, any of which may be read profitably by the beginner. The following are recommended especially because they present the most recent tendencies in juristic thinking:

Sternberg, Allgemeine Rechtslehre (1904).

Kohler, Einführung in die Rechtswissenschaft (4 ed. 1912).

Radbruch, Einführung in die Rechtswissenschaft (1910).

Krückmann, Einführung in das Recht (1912).

In French an excellent book is:

Demogue, Les notions fondamentales du droit privé (1911).

Two Continental introductions to jurisprudence have been translated:

Korkunov, General Theory of Law (transl. by Hastings) (1909).

Gareis, Science of Law (transl. by Kocourek, 1911).

The most recent complete treatise is Stammler, Theorie der Rechtswissenschaft, (1911).

Almost all English and American treatises have been written either from the analytical or from the historical standpoint.

a. Primarily Analytical.

Austin, Jurisprudence (5 ed. 1911). The first six lectures were published in 1832. The third edition (posthumous) 1863, or any subsequent edition, should be used. This is the foundation of all study of analytical jurisprudence. An abridgment by Campbell, styled "Student's Edition" (11 ed. 1909), may be recommended.

Holland, Elements of Jurisprudence (11 ed. 1910). The ninth or any subsequent edition may be used.
Salmond, Jurisprudence (4 ed. 1913).
Markby, Elements of Law (6 ed. 1905).
Brown, The Austinian Theory of Law (1906).
Pollock, First Book of Jurisprudence (3 ed. 1912).
Gray, The Nature and Sources of the Law (1909).

Reference may be made also to: Amos, Systematic View of the Science of Jurisprudence (1872); Amos, The Science of Law (2 ed. 1874); Hearn, The Theory of Legal Duties and Rights (1884); Rattigan, The Science of Jurisprudence (3 ed. 1909); Dillon, The Laws and Jurisprudence of England and America (1894); Goadby, Introduction to the Study of Law (1910).

b. Historical.

Maine, Ancient Law. New edition with introduction and notes by Sir Frederick Pollock (1906).

This book, first published in 1861, has gone through many editions in England and America. Pollock's edition is recommended.

Maine, Early History of Institutions (1874. New edition, 1891).
Maine, Early Law and Custom (1883. New edition, 1891).
Maine, Village Communities in the East and West (1871. New edition, 1891).

These works of Sir Henry Maine are the foundation of all study of historical jurisprudence.

Clark, Practical Jurisprudence (1883).
Carter, Law: Its Origin, Growth and Function (1907).

Reference may be made also to Pulszky, Theory of Law and Civil Society (1888); Lightwood, The Nature of Positive Law (1883). Hastie, Outlines of Jurisprudence (1887), contains a translation of Puchta's juristic encyclopaedia.

c. Philosophical.

Lorimer, Institutes of Law (2 ed. 1880).
Miller, Lectures on the Philosophy of Law (1884).
Miller, The Data of Jurisprudence (1903).
Herkless, Lectures on Jurisprudence (1901).
Spencer, Justice (1891).

Green, Principles of Political Obligation (Works, ii, 335–553). These lectures were delivered 1879–1880.

Dicey, Lectures on the Relations between Law and Public Opinion in England in the Nineteenth Century (1905).

Brown, The Underlying Principles of Modern Legislation (1912).

The following translations are important:

Kant, Philosophy of Law (transl. by Hastie, 1887).

Fichte, Science of Rights (transl. by Kroeger, 1889).

Hegel, Philosophy of Right (transl. by Dyde, 1896).

Berolzheimer, The World's Legal Philosophies (transl. by Jastrow, 1913).

Reference may be made also to Phillipps, Jurisprudence (1863); Hutchison Stirling, Lectures on the Philosophy of Law (1873 — a mere outline of Hegel's philosophy); a translation of portions of Ahrens' juristic encyclopaedia in Hastie, Outlines of Jurisprudence (1887); Lioy, Philosophy of Right (transl. by Hastie, 1891).

The materials for analytical jurisprudence are drawn from the two developed systems of law:

1. The Roman or Civil law, beginning as the law of the City of Rome, became the law of the Roman empire and thus of the ancient world, and eventually, by absorption or reception from the twelfth to the eighteenth century, the law of modern Continental Europe. It is now the foundation or a principal ingredient of the law in Continental Europe (including Turkey), Scotland, Egypt, Central and South America, Quebec and Louisiana, and all French, Dutch, Spanish or Portuguese colonies or countries settled by those peoples.

a. Roman law.

The authoritative form of the Roman law for the modern world is the *Corpus Iuris Ciuilis*, or compilation of the Emperor Justinian. The best edition is that of Mommsen, Krüger and Schoell (Stereotype ed. 1877–1895). The twelfth stereotype ed. is now appearing.

The sources prior to Justinian may be found in convenient form in

Girard, Textes du droit Romain (4 ed. 1913).

There are good English translations of the Digest (in part), the Institutes, and the Commentaries of Gaius:

Monro, The Digest of Justinian, 2 vols. (incomplete, 1904–1909).

There are also separate translations by Monro of five titles not included in the foregoing.

Moyle, English Translation of the Institutes of Justinian (4 ed. 1906).

Abdy and Walker, The Institutes of Justinian. Translated with Notes (1876).

Poste, The Elements of Roman Law of Gaius, with a Translation and Commentary (4 ed. 1905).

Muirhead, Institutes of Gaius and the Rules of Ulpian with Translation and Notes (2 ed. 1895).

Abdy and Walker, The Commentaries of Gaius. Translated with Notes. (New ed. 1880).

Institutional books in English are:

Sohm, Institutes of Roman Law (transl. by Ledlie, 3 ed. 1907).

Salkowski, Roman Private Law (transl. by Whitfield, 1886).

Buckland, Elementary Principles of Roman Private Law (1912).

The most satisfactory introductions for beginners are:

Girard, Manuel élémentaire du droit Romain (5 ed. 1912).

Czyhlarz, Lehrbuch der Institutionen des römischen Rechts (11 and 12 ed. 1911).

b. The Civil Law.

For the modern Roman law the best works of reference are:

Savigny, System des heutigen römischen Rechts, 8 vols. (1840–1849).

Windscheid, Lehrbuch des Pandektenrechts, 3 vols. (9 ed. by Kipp, 1906).

Dernburg, Pandekten, 3 vols. (8 ed. 1910–1912).

c. Modern French law.

The best institutional works are:

Capitant, Introduction à l'étude du droit civil (3 ed. 1912).

Planiol, Traité élémentaire du droit civil, 2 vols. (6 ed. 1912).

Baudry-Lacantinerie, Précis du droit civil, 3 vols. (10 ed. 1908–1910).

The leading work of reference is:

Baudry-Lacantinerie, Traité du droit civil, 29 vols. (2 ed. 1899–1905).

d. Modern German law.

The best introductions are:

Schuster, The Principles of German Civil Law (1907).

Cosack, Lehrbuch des deutschen bürgerlichen Rechts, 2 vols. (5 ed. 1910–1912).

The chief works of reference are:

Crome, System des deutschen bürgerlichen Rechts, 5 vols. (1900–1912).

Planck, Bürgerliches Gesetzbuch, 6 vols. (3 ed. 1903–1905).

Endemann, Lehrbuch des bürgerlichen Rechts, 3 vols. (7–9 ed. 1900–1908).

Staudinger, Kommentar zum bürgerlichen Gesetzbuch, 7 vols. (7–8 ed. 1912–1913).

e. Swiss law.

Rossel et Mentha, Manuel du droit civil Suisse, 3 vols. (1910–1912).

f. Scotch law.

Bell, Principles of the Law of Scotland (10 ed. 1899).

Erskine, Principles of the Law of Scotland (20 ed. by Rankine, 1903).

g. Roman-Dutch law.

Wessels, History of the Roman-Dutch Law (1908).

Van der Linden, Institutes of the Laws of Holland, transl. by Juta (5 ed. 1906).

Nathan, The Common Law of South Africa, 4 vols. (1904–1907).

h. Japanese law.

De Becker, Annotated Civil Code of Japan, 4 vols. (1909–1910).

Nobushige Hozumi, Lectures on the Japanese Civil Code (2 ed. 1912).

2. The Common law, Germanic in origin, was developed by the English courts from the thirteenth to the nineteenth century, and has spread over the world with the English race. It now prevails in England and Ireland; the United States, except Louisiana; Porto Rico and the Philippines; Canada, except Quebec; Australia; India, except Ceylon and except over Hindus and Mohammedans as to inheritance and family law; and the principal British dominions and colonies, except South Africa.

3. The Canon law — the law of the church during the Middle Ages.

Corpus Juris Canonici, ed. by Friedberg, 3 vols. (1876–1882).

Sohm, Kirchenrecht (1892).

Hinschius, Kirchenrecht, 6 vols. (1896–1897).

4. International law — a system of adjusting the relations of states with one another so as to meet the approval of the moral sentiment of the community of nations; an application of the principles of private law to states.

A convenient work for students for the present purpose is:

Oppenheim, International Law, 2 vols. (2 ed. 1912.)

The materials for historical jurisprudence are drawn from (1) the history of the developed systems of law, Roman and Germanic, (2) the systems of law which obtained among peoples of some degree of civilization which did not attain to maturity because of the spread of the Roman law, or of the English law, (3) the Hindu and Mahommedan law, which have a limited application today in India, and (4) the legal institutions of primitive and uncivilized peoples.

(1) History of developed systems of law.

(a) The legal institutions of Aryan peoples.

Leist, Altarisches Jus Civile, 2 vols. (1892–1896).

Leist, Altarisches Jus Gentium (1889).

(b) History of Roman law.

The best work in English is:

Muirhead, Historical Introduction to the Private Law of Rome (2 ed. by Goudy, 1899).

For reference see Kuhlenbeck, Entwickelungsgeschichte des römischen Rechts, 2 vols. (1910–1913); Karlowa, Römische Rechtsgeschichte, 2 vols. (1885–1901); Cuq, Les institutions juridiques des romains, 2 vols. (1891).

(c) Germanic Law.

The best introductions are:

v. Amira, Grundriss des Germanischen Rechts (2 ed. 1901).

Heusler, Institutionen des deutschen Privatrechts, 2 vols. (1885-1886).

For fuller expositions reference may be made to Gierke, Deutsches Privatrecht, 2 vols. (1895–1905); Brunner, Deutsche Rechtsgeschichte, 2 vols. (1892–1906); Maurer, Altnordische Rechtsgeschichte, 5 vols. (1907–1910).

A table of the principal sources may be found in Jenks, Law and Politics in the Middle Ages, 319–345.

The best edition of the Anglo-Saxon laws is Liebermann, Gesetze der Angelsachsen, 2 vols. (1903–1912).

There is an English edition (text and translation):

Thorpe, Ancient Laws and Institutes of England, 2 vols. (1840).

Reference may be made also to Essays in Anglo-Saxon Law (by Adams, Lodge, Young and Laughlin) (1876).

(2) Laws of civilized peoples which have not come to maturity.

i. Babylonian law.

Harper, The Code of Hammurabi (1904).

Johns, Babylonian and Assyrian Laws, Contracts and Letters (1904).

Kohler und Peiser, Aus dem babylonischen Rechtsleben, 4 parts (1890–1898).

ii. Egyptian law.

Revillout, Cours de droit égyptien (1884).

——, Les obligations en droit égyptien comparé aux autres droits d'antiquité (1886).

——, La propriété, ses démembrements, la possession et leurs transmissions en droit égyptien (1897).

——, Les actions publiques et privées en droit égyptien (1896–1897).

iii. Jewish law.

Rodkinson, The Babylonian Talmud, transl. into English, Section Jurisprudence, vols. 5–10 (1903).

Goldin, The Mishnah, A Digest of the Basic Principles of the Early Jewish Jurisprudence (1913).

Rabbinowicz, Législation civile du Talmud, Commentaire et traduction critique, 5 vols. (1873–1879).

iv. India — see infra, 3 i.

v. Greek law.

Roby, The Twelve Tables of Gortyn, 2 Law Quar. Rev. 135.

Bücheler und Zitelmann, Das Recht von Gortyn (1885).

Hermann, Lehrbuch der griechischen Rechtsaltertümer (4 ed. by Thalheim, 1895).

Telfi, Corpus Juris Attici (1868).

Busolt, Die griechischen Staats- und Rechtsaltertümer (2 ed. 1892).

Meier und Schömann, Der attische Prozess. (New ed. by Lipsius, 1883–1887).

Heffter, Die athenäische Gerichtsverfassung (1882).

Leist, Gräco-Italische Rechtsgeschichte (1884).

Mitteis, Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs (1891).

Hruza, Beiträge zur Geschichte des griechischen und römischen Familienrechts, 2 vols. (1892–1894).

vi. Irish law.

Ancient Laws of Ireland, 3 vols. (1865–1873).

Ginnell, The Brehon Laws (1894).

vii. Welsh law.

Owen, Ancient Laws and Institutes of Wales, 2 vols. (1841).

Wade-Evans, Welsh Medieval Law (1909).

viii. Slavonic law.

Sigel, Lectures on Slavonic Law (1902).

Kovalevsky, Modern Customs and Ancient Laws of Russia (1891).

Macieiowski, Slavische Rechtsgeschichte, 2 vols. (1835–1839).

Bunge, Altivlands Rechtsbücher (1879).

von Ostrowski, Civilrecht der polnischen Nation, 2 vols. (1797–1802).

Krauss, Sitte und Brauch der Südslaven (1885).

(3) Hindu and Mahommedan law.

Markby, Introduction to Hindu and Mohammedan Law (1906).

i. Hindu law.

Gautama (transl. by Bühler) (1879).

Vasishtha (transl. by Bühler) (1882).

Vishnu, (transl. by Jolly) (1880).

Manu (transl. by Bühler) (1886).

Narada (transl. by Jolly) (1876).

Mayne, Treatise on Hindu Law and Usage (7 ed. 1906).

Cowell, Short Treatise on Hindu Law (1895).

Colebrooke, Digest of Hindu Law, 2 vols. (4 ed. 1874).

West and Bühler, Digest of Hindu Law, 2 vols. (3 ed. 1884).

ii. Mahommedan law.

The Hedaya or Guide, a Commentary on the Mussulman Laws (transl. by Hamilton). Edited by Grady (1870).

Wilson, Introduction to the Study of Anglo-Muhammadan Law (1894).

——, Digest of Anglo-Muhammadan Law (3 ed. 1908).
Abdur Rahim, Muhammadan Jurisprudence (1912).
Ameer Ali, Mohammedan Law, 2 vols. (2 ed. 1894).
Kohler, Rechtsvergleichende Studien über islamitisches Recht, das Recht der Berbern, das chinesische Recht und das Recht auf Ceylon (1889).

(4) Legal Institutions of Primitive and Uncivilized Peoples.
Post, Grundriss der ethnologischen Jurisprudenz, 2 vols. (1894–1895).
——, Afrikanische Jurisprudenz (1887).

The materials for philosophical jurisprudence are drawn not only from those of analytical and historical jurisprudence, but also from the several social sciences. The following works on the philosophy of law should be known to the student:

Kant, Metaphysische Anfangsgründe der Rechtslehre (2 ed. 1798).
Hegel, Grundlinien der Philosophie des Rechts, ed. by Gans (1840).
Krause, Abriss des Systemes der Philosophie des Rechtes (1825).
Ahrens, Cours de droit naturel (8 ed. 1892).
Jhering, Der Zweck im Recht, 2 vols. (4 ed. 1904).
Lasson, Lehrbuch der Rechtsphilosophie (1882).
Stammler, Wirthschaft und Recht (2 ed. 1905).
—— Lehre von dem richtigen Rechte (1902).
Kohler, Rechtsphilosophie und Universalrechtsgeschichte, in Holtzendorff, Encyklopädie der Rechtswissenschaft, vol. 1 (6 ed. 1904).
—— Lehrbuch der Rechtsphilosophie (1908).
Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, 5 vols. (1904–1907).

There are English translations of the first, second and one volume of the last.
The fifth and eighth are translating.

II. HISTORY OF JURISPRUDENCE: SCHOOLS OF JURISTS

Pollock, Oxford Lectures, 1–36; Pollock, Essays in Jurisprudence and Ethics, 1–30; Bryce, Studies in History and Jurisprudence, Essay XII; Munroe Smith, Jurisprudence, 30–42; Jethro Brown, The Austinian Theory of Law, Excursus F; Korkunov, General Theory of Law (transl. by Hastings), 23–30, 116–138; Lightwood, The Nature of Positive Law, Chaps. 12–13; Lorimer, Institutes of Law (2 ed.), 38–54; Miller, Lectures on the Philosophy of Law, Appendix E; Wigmore, Cases on Torts, Appendix A, § 3.

Clark, Practical Jurisprudence, 1–6; Westlake, Chapters on the Principles of International Law, 17–51; Lee, Historical Jurisprudence, 229–234, 255-261, 386–398; Sohm, Institutes of Roman Law (transl. by Ledlie), Grueber's Introduction (in first ed. only), i–xxvi; Hastie, Outlines of Jurisprudence, 237–253, 260–271.

Leonhard, Methods followed in Germany by the Historical School of Law, 7 Columbia Law Rev. 573; Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Rev. 591, 25 Harvard Law Rev. 140, 489; Munroe Smith, Four German Jurists, 10 Pol. Sci. Quart. 664, 11 Pol. Sci. Quart. 278, 12 Pol. Sci. Quart. 21.

Berolzheimer, The World's Legal Philosophies, Chaps. 5 and 7; Charmont, La renaissance du droit naturel, Chaps. 1–4; Brugeilles, Le droit et la sociologie, Introduction and Chaps. 1, 2; Rolin, Prolégomènes à la science du droit, 1–9.

Amos, Systematic View of the Science of Jurisprudence, 40–43 (1872); Holland, Elements of Jurisprudence (11 ed.), 1–13; Puchta, Cursus der Institutionen, I, §§ 33–35 (1841), English transl. by Hastie, Outlines of Jurisprudence, 124–132; Burlamaqui, Principes du droit naturel, Pt. I, Chap. 8, §§ 1–2 (1747), English transl. by Nugent, Vol. I, pp. 76–78; Fichte, Grundlage des Naturrechts, Introduction, § 2 (1796), English transl. by Kroeger (as Fichte's Science of Rights), 16–21; Hegel, Grundlinien der Philosophie des Rechts, §§ 1–3 (1820), English transl. by Dyde (as Hegel's Philosophy of Right), 1–10; Boistel, Cours de philosophie du droit, §§ 1–2 (1899); Miller, Data of Jurisprudence, 1–2 (1902); Post, Ethnologische Jurisprudenz, I, §§ 1–2 (1894); Jhering, Der Zweck im Recht, I, 443–445 (4 ed. 1904 — but first written in 1877); Stammler, Die Lehre von dem richtigen Rechte, 3–11 (1902); Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzen-

dorff, Encyklopädie der Rechtswissenschaft, 6 ed., Vol. I), §§ 8–10 (1904); Brooks Adams, The Modern Conception of Animus, 19 Green Bag, 12, 33 (1907); Croce, Riduzione della filosofia del diritto alla filosofia dell' economia, 30–46 (1907); Pound, Political and Economic Interpretations of Jurisprudence, Proc. Am. Pol. Sci. Ass'n. 1912, 95; Kantorowicz, Rechtswissenschaft und Soziologie, 1–15, 21–30 (1911); Burdick, Is the Law the Expression of Class Selfishness? 25 Harvard Law Rev., 349.

The beginnings of a science of law are to be found in the contact of Roman lawyers and Greek philosophers in the later years of the Roman republic.

(a) The *ius gentium* — "a combination of comparative jurisprudence and rational speculation."

Muirhead, Historical Introduction to the Private Law of Rome, § 42.
Sohm, Institutes of Roman Law (transl. by Ledlie), §§13–17.
Girard, Short History of Roman Law (transl. by Lefroy and Cameron), 7–8.
Voigt, Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer, i, §§ 13–15, 42, 43, 79–88, 103.
Karlowa, Römische Rechtsgeschichte §§ 59–60.
Kuhlenbeck, Entwickelungsgeschichte des römischen Rechts, i, 205–235.

(b) The progress of juridical speculation developed the *ius naturale* — a speculative body of principles, serving as the basis of criticism, of potential applicability to all men, in all ages, among all peoples, derived from reason and worked out philosophically.

Muirhead, § 55.
Bryce, Studies in History and Jurisprudence, Essay XI.
Maine, Ancient Law, Chaps. 3 and 4 and Sir Frederick Pollock's notes E and G.
Voigt, Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer, i, §§ 15–41, 52–64, 98.

The history of modern legal science begins with the revival of the study of Roman law at Bologna in the twelfth century.

The Glossators.
The Commentators.
The Humanists.

French School — scientific study of law in modern countries begins.
Jacobus Cuiacius (Jacques Cujas, 1522–1590).
Hugo Donellus (Doneau, 1527–1591).

Emancipation of Jurisprudence from Theology.

The Protestant jurist-theologians.
Hugo Grotius (De Groot, 1583–1645).

The Law-of-Nature School.

As a revolt from the latter, largely under the influence of the philosophy of Kant, arose:

(1) The Historical School.

Friedrich Carl von Savigny (1779–1861).

(2) As a later development of the revolt:

The English Analytical School.

Precursors: Thomas Hobbes (1588–1679).
Jeremy Bentham (1748–1832).
Founder: John Austin (1790–1859).

A revolt from the latter school produced:

The English Historical School.

Sir Henry Maine (1822–1888).

In the nineteenth century the philosophical method was continued by

The Metaphysical School.

At the end of the nineteenth century a revolt from the historical school, which had all but supplanted philosophical jurisprudence, and a development of the philosophical school, resulted in:

The Social-Philosophical School.

There are three varieties:

(1) The Social Utilitarians.
(2) The Neo-Kantians.
(3) The Neo-Hegelians.

The Revival of Natural Law in France.

The Economic Interpretation.

At the same time, beginning under the influence of the positivist philosophy, there arose:

The Sociological School.

(1) The mechanical stage.
(2) The biological stage.
The socialist jurists.
Anton Menger (ob. 1906).
(3) The psychological stage.
Gabriel Tarde (1843–1904).
(4) The stage of unification.

The philosophical schools compared:

Law-of-Nature	Metaphysical	Social-Philosophical
Sought to deduce a complete system of principles, of universal validity, from the nature of man in the abstract and to develop these principles into an all-sufficient code of legal rules.	Sought to deduce from some single fundamental idea of right a complete system of principles of universal validity to which jurists should endeavor to make the actual law conform.	"Seeks the ideal side and the enduring idea" of the actual law.

The types of the Social-Philosophical school:

	Social Utilitarians	Neo-Kantians	Neo-Hegelians
Tendency.	Analytical and sociological	Philosophical and sociological	Historical and sociological
Leading Representative	Rudolf von Jhering (1818–1892)	Rudolf Stammler	Josef Kohler
Achievements	(1) Overthrow of the "jurisprudence of conceptions." (2) Insistence upon the interests which the legal system secures rather than upon the rights by which it secures them. (3) The theory of punishment as something to be adjusted to the criminal rather than to the nature of the crime. (4) Recognition in recent Continental thought of the imperative idea of law.	(1) Turning attention from the relations of morals and ethics to abstract rules and directing it to the relation of these matters to the administration of justice through rules. (2) The theory of the social ideal as the criterion of justice through rules. (3) Adding a theory of the just decision of causes to the theory of making just rules.	(1) The theory of law as the product of the civilization of a people. (2) The theory of the relation of comparative legal history and the philosophy of law. (3) Theory of the sociological interpretation and application of legal rules.

The principal schools of jurists compared:

Analytical	Historical	Philosophical	Sociological
Consider developed systems only.	Consider the past rather than the present of law.	Seek ideal standards by which to criticise the law that exists.	Consider the working of law more than its abstract content.
Regard law as something made consciously by law-givers, legislative or judicial.	Regard law as something that is not and in the long run cannot be made consciously.	Agree with the historical jurist that law is not made, but is found.	Regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.
See chiefly the force and constraint behind legal rules; conceive that the sanction of law is enforcement by the judicial organs of the state, and that nothing which lacks an enforcing agency is law.	See chiefly the social pressure behind legal rules; find sanction in habits of obedience, displeasure of one's fellowmen, public sentiment or opinion, or the social standard of justice.	Look at the ethical bases of rules rather than at their sanction.	Lay stress upon the social purposes which law subserves rather than upon sanction.
Take statute as the typical law.	Take custom or those customary modes of decision that make up a body of juristic tradition or of case law as the type of law.	Have no necessary preference for any form of law.	Look upon legal doctrines, rules and standards functionally and regard the form as a matter of means only.
Their philosophical views are utilitarian or teleological.	As a rule they have been Hegelians.	Hold very diverse philosophical views. In the XIX century Hegelians or Krauseans. Today some form of the Social-Philosophical School.	Their philosophical views are very diverse. Chiefly (*a*) Social-Philosophical of one type or another, (*b*) Pragmatist.

The programme of the Sociological School.

The Sociological jurists insist upon six points:

(1) Study of the actual social effects of legal institutions and legal doctrines.

(2) Sociological study in preparation for law-making.

(3) Study of the means of making legal rules effective.
(4) A sociological legal history.
(5) The importance of reasonable and just solutions of individual cases.
(6) That the end of juristic study, toward which the foregoing are but some of the means, is to make effort more effective in achieving the purposes of law.

DEFINITIONS OF JURISPRUDENCE FOR DISCUSSION IN CONNECTION WITH THE FOREGOING:

The formal science of positive law. Holland, Elements of Jurisprudence (11 ed.) 13.

Scientific knowledge of the history and system of right (law). Puchta, Cursus der Institutionen, I, § 33.

The ultimate object of jurisprudence is the realization of the idea in the ideal of humanity, the attainment of human perfection, and this object is identical with the object of ethics. . . .

The proximate object of jurisprudence, the object which it seeks as a separate science (i.e. from ethics) is liberty. But liberty, being the perfect relation between human beings, becomes a means towards the realization of their perfection as human beings. Hence jurisprudence, in realizing its special or proximate object, becomes a means towards the realization of the ultimate object which it has in common with ethics. The relation in which jurisprudence stands to ethics is thus a subordinate one, the relation of species to genus. — Lorimer, Institutes of Law (2 ed.), 353, 355.

The science of the human will, in the distinction of the particular from the universal, and in the relation of the particular to the universal. — Herkless, Jurisprudence, 1.

Jurisprudence has for its subject law, that is, an aggregate of standards which determine the mutual relations of men living in a community. — Arndts, Juristische Encyklopädie, § 1.

Juristic encyclopedia, accordingly, is a systematic, unified survey of the means of peaceable adjustment of the external relations of mankind and social communities. — Gareis, Science of Law (transl. by Kocourek), 26.

It is at once a philosophy, a science, and an art. As a philosophy, its desire is to understand justice; as a science, its purpose is to explain the evolution of justice; as an art, its aim is to formulate those rules of conduct essential to the realization of justice. Conceived in this manner, jurisprudence forms the background of all associated activity; it provides the framework that limits and controls the exercise of liberty; it reflects the color and resounds the tone of those unconscious premises of action which give character to a civilization. The law is neither a schoolmaster for instruction nor a guardian for command; it is rather the expression of the ethical sense of a community crystallized about the problem of common living. — Adams, Economics and Jurisprudence, 8.

The science of law in the wider sense is our whole knowledge of law. But this knowledge is on the one hand practical, on the other hand philosophical. Accordingly it may be divided into the science of law in its narrower and more proper sense, called jurisprudence, and the philosophy of law. — Sternberg, Allgemeine Rechtslehre, I, § 12.

General theory of law investigates the formal (constructive) side of fundamental juristic conceptions and legal institutions; the philosophy of law investigates their material kernel and basis. — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 20.

The Science of Justice as practised in civilized nations. — Beale, The Development of Jurisprudence during the Nineteenth Century: Select Essays in Anglo-American Legal History, I, 558.

2

THE END OF LAW

III. THEORIES OF JUSTICE

Miller, The Data of Jurisprudence, Chap. 6; Salmond, Jurisprudence, § 9; Pulszky, Theory of Law and Civil Society, § 173; Bentham, Theory of Legislation, Principles of the Civil Code, Part I, Chaps. 1–7; Holland, Jurisprudence, Chap. 6.

Kant, Philosophy of Law (Hastie's transl.), 45–46 (§ C); Spencer, Justice, Chaps. 5, 6; Willoughby, Social Justice, Chap. 2; Sidgwick, The Methods of Ethics, Chap. 5; Paulsen, Ethics (Thilly's transl.), Chap. 9; Gareis, Vom Begriff Gerechtigkeit; Demogue, Notions fondamentales du droit privé, 119–135; Picard, Le Droit Pur, Liv. IX (Le but du droit: La justice).

A

Historical: The End of Law as Developed in Legal Rules and Doctrines

1. *Archaic Law*

Holmes, Common Law, Lect. I; Post, Ethnologische Jurisprudenz, II, §§ 58–59; Fehr, Hammurapi und das Salisches Recht, 135–138.

Code of Hammurabi, §§ 196–214 (Harper's transl.); Laws of Manu, VIII, 279–280 (Bühler's transl.); Twelve Tables of Gortyna, II, 4–5 and IX (Roby's transl. in 2 Law Quar. Rev. 125); Law of Draco quoted by Demosthenes against Aristocrates, § 96 — "If any one is killed violently, reprisals by seizing men (τὰς ἀνδροληψίας) to be a right of his nearest relatives until justice is done for the murder or the murderers are surrendered. But this right of reprisal to extend to three men and no more"; Law of Draco, quoted by Plutarch, Life of Solon, — "He (Draco) likewise enacted a law for the reparation of damage received from beasts. A dog that had bit a man was to be delivered up bound to a log four cubits long"; Twelve Tables, VIII, 2–3, 12–13, XII, 2a (transl. in Goodwin, XII Tables, 13, 14); Gaius, III, §§ 183–192, 222–223, IV, §§ 75–78 (transl. by Abdy and Walker, and by Poste); Salic Law, XIV, 1–3, XXX, 4–7, XL (transl. in Henderson, Historical Documents of the Middle Ages); Laws of Ethelbert, §§ 33–61 (transl. in Thorpe, Ancient Laws of England, I, 13–18); Laws of Alfred, § 24 (transl. in Thorpe, I, 79); Evans, Mediaeval Welsh Law (Laws of Howel the Good), 185–187, 190–191; Abdur Rahim, Muhammadan Jurisprudence, 358–359.

2. *The Strict Law*

Gaius, III, § 168, IV, §§ 116–117; Heusler, Institutionen des deutschen Privatrechts, I, § 12; Justinian, Institutes, II, 23 (transl. by Abdy and Walker and by Moyle); Doctor and Student, Dial. II, Chaps. 6, 7, 11, 24; Hargrave, Law Tracts, 324-325; Finch, Law, Chap. 3; Coke, Fourth Institute, 82–84; Kerly, History of Equity, 113–115; Ames, Specialty Contracts and Equitable Defences, 9 Harvard Law Rev., 49.

Aristotle, Politics, Bk. II. Chap. 8 (Welldon's transl. 71–72); Mirror of Justices, Chap. 5, §§ 1, 19; Letter of Thomas Jefferson to John Tyler, Tyler, Letters and Times of the Tylers, I, 35; Loyd, Early Courts of Pennsylvania, 162–163, 189–190, 193–195, 196–197, 209–210.

3. *Equity: Natural Law*

Voigt, Das Jus Naturale, Aequum et Bonum und Jus Gentium der Römer, I, 321–323.

i. *Human beings as subjects of legal rights*

Institutes of Justinian, I, 3, § 2, 8, §§ 1, 2 (transl. by Moyle and Abdy and Walker); Digest, I, 5, 17 (transl. by Monro); Salkowski, Institutes of Roman Law (transl. by Whitfield), 160, 162, 248–253, 280–285; Gaius, I, §§ 144–145; Grotius, Bk. 2, Chap. 5, §§ 1–7; Maine, International Law (American ed.), 126–127.

ii. *Substance rather than form*

Digest of Justinian, IV, 5, 2, § 1 (transl. by Monro); Gaius, I, § 158; II, §§ 40–41, 101–104, 115–117, 119; IV, § 36; Muirhead, Historical Introduction to the Private Law of Rome (2 ed.), 226; Phelps, Juridical Equity, §§ 194–204.

iii. *Good faith*

Gaius, IV, §§ 61–62; Muirhead, Historical Introduction to the Private Law of Rome (2 ed.), 267–268; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.) 106–108; Gaius, II, § 43; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), 222–223; Digest of Justinian, XXII, 1, 25, § 1, XLI, 1, 40, XLI, 1, 48, pr. and § 1; Code of Justinian, III, 32, 22; Digest of Justinian, XLI, 3, 4, § 20; Gaius, II, § 43; Digest, L, 17, 84, § 1; Sext, I, 18; Grotius, Bk. III, Chap. 11, §§ 3–4 (transl. by Whewell); Pufendorf, Law of Nature and Nations (Kennet's transl.), Bk. III, Chap. 4; Burlamaqui, Principles of Natural and Politic Law (Nugent's transl.), Bk. II, Pt. 4, Chap. 10, § 4, Bk. I, Pt, 1, Chap. 7; Maine, Ancient Law, Chap. 9; Ames, Law and Morals, 22 Harvard Law Rev. 97, 106.

iv. *Unjust enrichment*

Digest, L, 17, 206, XII, 6, 1, XII, 6, 66; Moses v. Macferlan, 2 Burr. 1005; Ames, Law and Morals, 22 Harvard Law Rev. 97, 106.

4. *The Maturity of Law*

i. *Equality*

Digest, I, 1, 4; Bentham, Theory of Legislation, Principles of the Civil Code, Pt. I, Chap. 2; Clark, Practical Jurisprudence, 110–114; Austin, Jurisprudence (3 ed.), 97–98; Stephen, Liberty, Equality, Fraternity, 189–255; Maine, Early History of Institutions (American ed.), 398–400; Miller, Data of Jurisprudence, 379–381; Lorimer, Institutes of Law (2 ed.), 375–414; Ritchie, Natural Rights, Chap. 12; Demogue, Notions fondamentales du droit privé, 136–142.

ii. *Security*

Bentham, Theory of Legislation, Principles of the Civil Code, Pt. 1, Chaps. 2, 7; Lorimer, Institutes of Law (2 ed.), 367–374; Gareis, Science of Law (transl. by Kocourek), 33; Demogue, Notions fondamentales du droit privé, 63–110.

5. *The Socialization of Law*

Jhering, Scherz und Ernst in der Jurisprudenz (10 ed 1909) 408–425.

i. *Limitations on the use of property: anti-social exercise of rights*

German Civil Code, § 226; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 77; Planiol, Traité élémentaire du droit civil, II, §§ 870–871; Walton, Motive as an Element in Torts in the Common and in the Civil Law, 22 Harvard Law Rev. 501; Huffcut, Percolating Waters; The Rule of Reasonable User, 13 Yale Law Journ. 222; Ames, How far an Act may be a Tort because of the Wrongful Motive of the Actor, 18 Harvard Law Rev. 411, 414ff.; Wigmore, Cases on Torts, II, App. A, §§ 262, 271–272.

ii. *Limitations on freedom of contract*

Goodnow, Social Reform and the Constitution, 242–258; Wyman, Public Service Corporations, I, § 331; Pound, Liberty of Contract, 18 Yale Law Journ. 454; Noble State Bk. *v.* Haskell, 219 U. S. 104; Chicago B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 566–575.

iii. *Limitations on the* jus disponendi

Gray, Restraints on the Alienation of Property (2 ed.), viii–ix; Thompson, Homesteads and Exemptions, § 465; Mass. Acts of 1908, Chap. 605; Ill. Rev. St. 1909, Chap. 95, § 24.

iv. *Limitations on the power of the creditor or injured party to exact satisfaction*

Thompson, Homesteads and Exemptions, §§ 40, 379; German Civil Code, §§ 528–529, 829.

v. *Liability without fault; responsibility for agencies employed*

Wambaugh, Workmen's Compensation Acts, 25 Harvard Law Rev. 129; Opinion of the Justices, 209 Mass. 607; State *v.* Clausen, 65 Wash. 156; Borgnis *v.* Falk, 147 Wis. 327. See Ives *v.* Railroad Co., 201 N. Y. 271.

vi. *Change of* res communes *and* res nullius *into* res publicae

See statutes in 1 Wiel, Water Rights (3 ed.), §§ 6, 170; *Ex parte* Bailey, 155 Cal. 472; Greer *v.* Connecticut, 181 U. S. 519.

vii. *Interest of society in dependent members of the household*

Mack, The Juvenile Court, 23 Harvard Law Rev. 104.

B

Philosophical: The End of Law as Developed in Juristic Thought

1. *Greek*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 13–16 ; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 1–121.

Aristotle, Nicomachaean Ethics, Bk. V (convenient transl. by Browne, in Bohn's Libraries) ; Dunning, Political Theories, Ancient and Mediaeval, 28, 105; Zeller, Aristotle and the Earlier Peripatetics (transl. by Costelloe and Muirhead) II, 175, 197.

Shall we not then find that in such a city a shoemaker is only a shoemaker, and not a pilot along with shoemaking, and that the husbandman is only a husbandman, and not a judge along with husbandry; and that the soldier is a soldier, and not a money-maker besides; and all others in the same way ? He admitted it. And it would appear that if a man, who through wisdom were able to become everything and to imitate everything should come into our city and should wish to show us his poems, we should honor him . . . but we should tell him that there is no such person with us in our city, nor is there any such allowed to be, and we should send him to some other city. — Plato, Republic, III, 424.

Compare St. Paul in Eph. v, 22 ff. and vi, 1–5.

2. *Roman*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 17–20; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 131–135, 143–147.

Institutes of Justinian I, 1, pr. and § 3: Cicero, De Officiis, II, 12, De Republica, I, 32; Willoughby, Political Theories of the Ancient World, 64–65.

3. *Mediaeval*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 21–23; Ahrens, Naturrecht, I, § 12.

Thomas Aquinas, Summa Theologiae, prima secundae, qu. 90–97, secunda secundae, qu. 57–80, 120, 122; Dunning, Political Theories, Ancient and Mediaeval, 158, 196.

4. *The Reformation*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 24; Hinrichs, Geschichte der Rechts und Staatsprincipien seit der Reformation, I, 1–60.

5. *The Spanish Jurist-Theologians*

Figgis, Studies of Political Thought from Gerson to Grotius, Lect. VI; Dunning, Political Theories from Luther to Montesquieu, 132–149.

6. *The Seventeenth Century*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 25–27; Stintzing, Geschichte der deutschen Rechtswissenschaft, II, 1–111; Hinrichs, Geschichte der Rechts und Staatsprincipien seit der Reformation, I, 60–274, II, III, 1–318; Dunning, Political Theories from Luther to Montesquieu, 164–171, 318–325.

Grotius, I, 1, 3–6, 8–11; Pufendorf, De Jure Naturae et Gentium, I, Chap. 7, §§ 6–17; Hobbes, Leviathan, Chap. 15; Duff, Spinoza's Political and Ethical Philosophy, Chap. 22.

That is unjust which is contrary to the nature of rational creatures. — Grotius, I, 1, 3, § 1.

From that law of nature by which we are obliged to transfer to another such rights as being retained hinder the peace of mankind, there followeth a third, which is this, "that men perform their covenants made"; without which covenants are in vain and but empty words, and the right of all men to all things remaining, we are still in a condition of war. And in this law of nature consisteth the fountain and original of justice. For where no covenant hath preceded, there hath no right been transferred and every man has right to everything, and consequently no action can be unjust. But when a covenant is made, then to

break it is unjust; and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just. . . . And therefore where there is no 'own,' that is no property, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth, there is no property, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice consists in keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that property begins. — Hobbes, Leviathan, Chap. 15.

Again, in the state of nature no one is by common consent master of anything, nor is there anything in nature which can be said to belong to one man rather than another. Hence in the state of nature we can conceive no wish to render to every man his own or to deprive a man of that which belongs to him; in other words, there is nothing in the state of nature answering to justice and injustice. Such ideas are only possible in a social state, when it is decreed by common consent what belongs to one man and what to another. — Spinoza, Ethics, Pt. IV, pr. 37, n. § 2 (Elwes' transl.).

7. *The Eighteenth Century*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 29; Korkunov, General Theory of Law (transl. by Hastings), § 7; Ritchie, Natural Rights, Chap. 3; Charmont, La renaissance du droit naturel, 10–43.

Burlamaqui, Principles of Natural and Politic Law (Nugent's transl.), Pt. I, Chap. 5, § 10, and Chap. 10, §§ 1–7; Rousseau, Social Contract, Bk. II, Chap. 6 (transl. by Barrington and by Tozer); Montesquieu, Spirit of Laws, Bk. I (Nugent's transl., ed. by Prichard, Vol. I, 1–7); Vattel, Law of Nations, Bk. I, Chap. 2, §§ 15–17 (there are several English versions); 1 Blackstone, Commentaries, 38–43; Rutherforth, Institutes of Natural Law, Bk. II, Chap. 5, §§ 1–3.

I shall close this chapter and this book with a remark which ought to serve as a basis for the whole social system; it is that instead of destroying natural equality, the fundamental pact, on the contrary, substitutes a moral and lawful equality for the physical inequality which nature imposed upon men, so that

though unequal in strength or intellect, they all become equal by convention and legal right. — Rousseau, Social Contract, Bk. I, Chap. 9 (Tozer's transl.).

Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of the will of each and all in action according to a universal law. — Kant, Rechtslehre, xxxv (Hastie's transl.).

I must in all cases recognize the free being outside of me as such, that is, must limit my liberty by the possibility of his liberty. — Fichte, Grundlage des Naturrechts, I, 49.

8. *The Nineteenth Century*

i. *Metaphysical Jurists*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 35–37; Korkunov, General Theory of Law (transl. by Hastings), 320–322; Gray, Nature and Sources of Law, § 58.

Lasson, System der Rechtsphilosophie, §§ 24–25; Herkless, Lectures on Jurisprudence, Chap. 4; Hegel, Philosophy of Right (Dyde's transl.), §§ 29—33.

This is right: that an existence in general is existence of the free will. Accordingly it is in general liberty as an idea. — Hegel, Grundlinien der Philosophie des Rechts, 61.

We may define right as a principle . . . governing the exercise of liberty in the relations of human life. — Ahrens, Cours du Droit Naturel (8 ed.), I, 107.

Right is the sum of those universal determinations of action through which it happens that the ethical whole and its parts may be preserved and further developed. — Trendelenburg, Naturrecht, § 46.

The fundamental Axiom which forms the basis of the whole system of Natural Justice I conceive to be, that one human being has *no* right to control for his own benefit the volition of another. — Phillipps, Jurisprudence, 80–81 (§ 1).

The ultimate object of positive law is identical with the proximate object of natural law — viz. liberty. But being realizable only by means of order, order is the proximate object of positive law. — Lorimer, Institutes of Law (2 ed.), 523.

Reduced to these terms, the difference between morality and right is a difference in a degree and not of essence. Yet it is a

very important difference, as it *reduces the power of coercion to what is absolutely necessary for the harmonious coexistence of the individual with the whole.* — Lioy, Philosophy of Right (transl. by Hastie), I, 121.

Fundamental principles of justice: —

1. The first and highest fundamental principle of justice provides that everyone hold every good which he has unhindered by the acts of any other.

2. That for every value transferred, one receive in return an equal value.

3. Every newly produced value belongs to the producer.

4. Every destroyed good is to be destroyed to the destroyer, and if the destroyed good is another's, the destroyer suffers a subtraction from his own good until the injured person is compensated for his injury by an equivalent value. — Lasson, System der Rechtsphilosophie, § 24.

Right . [is] the correspondence or harmony of the will of the individual with the universal will. — Herkless, Lectures on Jurisprudence, 69.

The moral principle which protects the right is the inviolability of the human person. . . . This is the fundamental axiom upon which every doctrine of law may be and ought to be established. — Boistel, Cours de philosophie du droit, I, 72.

ii. *English Utilitarians*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 28; Markby, Elements of Law, §§ 51–59; Mill, On Liberty, Chap. 4; Bentham, Theory of Legislation, Principles of the Civil Code, Chaps. 1, 7; Dicey, Law and Public Opinion in England, § 6.

The ideas which underlie the Benthamite or individualistic scheme of reform may conveniently be summarized under three leading principles and two corollaries.

1. Legislation is a science. . . .

2. The right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness of the greatest number. . . .

3. Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at a

removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors. . . .

From these three guiding principles of legislative utilitarianism, — the scientific character of sound legislation, the principle of utility, faith in *laissez faire*, — English individualists have in practice deduced the two corollaries, that the law ought to extend the sphere and enforce the obligation of contract, and that, as regards the possession of political power, every man ought to count for one man and no man ought to count for more than one. — Dicey, Law and Public Opinion in England, 133–149.

iii. *The Historical School*

In virtue of freedom man is the subject of right and law. His freedom is the foundation of right and all real relations of right emanate from it. . . .

In thus founding right upon the possibility of an act of will, the essential principle of right is indicated as that of equality. Right implies the recognition of freedom as belonging equally to all men as subjects of the power of will. It receives its material and contents from the impulse of man to refer to himself what exists out of himself. The function of right, as manifested in law, is to apply the principle of equality to the relations which arise from the operation of this impulse. — Puchta, Cursus der Institutionen, I, § 4 (Hastie's transl.).

Law exists for the sake of liberty; it has its basis in this, that men are beings endowed with a disposition to free exertion of will. It exists to protect liberty in that it limits caprice. — Arndts, Juristische Encyklopädie, § 12.

Justice is thus the condition of social equilibrium, both with reference to the domain of the rule of the will of persons, that is with regard to the harmony of law and [individual] right, and with reference to the maintenance of the limits of action of different persons, or, in other words, to the mutual accommodation to each other of the several and distinct existing rights. — Pulszky, Theory of Law and Civil Society, § 173.

There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what

I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline. — Carter, Law: Its Origin, Growth and Function, 337.

iv. *The Positivists*

Hence that which we have to express in a precise way is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills provided he infringes not the equal freedom of any other man. — Spencer, Justice, § 27.

Our theory reconciles the idea of liberty with those of superior power and superior interest: right, concrete and complete, at the same time ideal and real, becomes the maximum of liberty, equal for all individuals, which is compatible with the maximum of liberty, of force and of interest for the social organism. — Fouillé, L'Idée moderne du droit (6 ed.), 394.

Courcelle-Seneuil's parallel: —

Ancient Ideal	*Nineteenth-Century Ideal*
1. Property founded on conquest.	1. Property founded on labor and saving.
2. Absolute power founded on military force.	2. Empire of laws freely assented to by all.
3. Classification by privilege founded on tradition and the will of the government.	3. Classification founded on personal merit, tested by competition.
4. A stationary society, corrected from time to time by reversion to the ancient type.	4. A progressive society, constantly improving itself by labor and invention.
5. A society ruled by laws, under the supervision of a public authority invested with compulsory powers.	5. A society living by the free initiative of its citizens, regulated by the observance of the moral law.

See Courcelle-Seneuil, Préparation à l'étude du droit, 99, 396.

9. *The Social-Philosophical School: Social Justice*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 43–48, 52; Stammler, Wesen des Rechts und der Rechtswissenschaft (in Systematische Rechtswissenschaft, i–lix); Kohler, Lehrbuch der Rechtsphilosophie, 38–43; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 ed. Vol. I), §§ 13–16, 33–34, 51.

Take any demand, however slight, which any creature, however weak, may make. Ought it not for its own sole sake to be satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way. . . . Any desire is imperative to the extent of its amount; it makes itself valid by the fact that it exists at all. Some desires, truly enough, are small desires; they are put forward by insignificant persons, and we customarily make light of the obligations which they bring. But the fact that such personal demands as these impose small obligations does not keep the largest obligations from being personal demands. . . . After all, in seeking for a universal principle, we inevitably are carried onward to the most universal principle — that *the essence of good is simply to satisfy demand.* . Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can?* That act must be the best act, accordingly, which makes for the *best whole,* in the sense of awakening the least sum of dissatisfactions. In the casuistic scale, therefore, those ideals must be written highest which *prevail at the least cost,* or by whose realization the least number of other ideals are destroyed. . . . The course of history is nothing but the story of men's struggle from generation to generation to find the more inclusive order. Invent some manner of realizing your own ideals which will also satisfy the alien demands, — that and that only is the path of peace! . . Though some one's ideals are unquestionably the worse off for each improvement, yet a vastly greater total number of them find shelter in our civilized society than in the older savage ways. . . . As our present laws and customs have fought and conquered other

past ones, so they will in their turn be overthrown by any newly discovered order which will hush up the complaints that they still give rise to without producing others louder still. — James, The Will to Believe, 195–206.

Justice to the individual, then, must according to these principles consist in the rendering to him, so far as possible, all those services, and surrounding him with all those conditions, which he requires for his highest self, for the satisfaction of those desires which his truest judgment tells him are good. Conversely, opportunity for fulfilment of highest aims is all that may be justly claimed as a right. — Willoughby, Social Justice, 20–21.

The satisfaction of everyone's wants so far as they are not outweighed by others' wants. — Adapted from Ward, Applied Sociology, 22–24.

The old justice in the economic field consisted chiefly in securing to each individual his rights in property or contracts. The new justice must consider how it can secure for each individual a standard of living, and such a share in the values of civilization as shall make possible a full moral life. — Dewey and Tufts, Ethics, 496.

Fundamental principles of just law:

1. One will must not be subject to the arbitrary will of another.
2. Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature.
3. No one is to be excluded from the common interest arbitrarily.
4. Every power of control conferred by law can be justified only in the sense that the individual subject thereto can yet exist as a fellow creature. — Stammler, Lehre von dem richtigen Rechte, 208–211.

3

THE NATURE OF LAW

IV. THEORIES OF LAW

Two distinct words, originally expressing two distinct ideas, are to be found in most languages spoken by peoples among whom law has reached any great development: —

Latin	*.ius*	*lex*
German	*.Recht*	*Gesetz*
French	*.droit*	*loi*
Italian	*.diritto*	*legge*
Spanish	*.derecho*	*ley*

Compare English, law, *a* law.

The one set of words has particular reference to the idea of right and justice, but is used to mean law in general.

It is appropriate to periods in which the law is formative, or is expanding and developing through juridical speculation or some other non-legislative agency.

The other refers primarily to that which is enacted or set authoritatively, but tends to mean law as a whole.

It is appropriate to periods of enacted law and to periods in which the growing point is in legislation.

These two sets of words represent respectively two ideas between which definitions of law have oscillated according to the circumstances of legal systems and the agencies through which their rules have been expressed for the time being.

1. Greek Definitions

What the ruling part of the state enacts after considering what ought to be done, is called law. — Xenophon (B.C. c. 429–c. 356), Memorabilia, I, 2, § 43.

Law is a definite statement according to a common agreement of the state giving warning how everything ought to be done. — Anaxamines (B.C. c. 560–c. 500), quoted by Aristotle, Rhetoric to Alexander, i.

The common law, going through all things, which is the same with Zeus who administers the whole universe. — Chrysippus (B.C. 287–209), quoted by Diogenes Laertius, vii, 88.

This is law, which all men ought to obey for many reasons, and chiefly because every law is both a discovery and a gift of God and a teaching of wise men and a setting right of wrongs, intended and not intended, but also a common agreement of the state, according to which everyone in the state ought to live. — Demosthenes (B.C. 384–322), Against Aristogeiton, 774.

2. Roman Definitions

Cicero (B.C. 106–43), in a transition period, when an era of enacted law had come to an end and one of juristic speculation was beginning, defines *lex*, using it in the wider sense of law in general, but insists largely on the ideas of reason and justice:

> *Lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria.* — De Legibus, I, 6.
>
> Law is the highest reason, implanted in nature, which commands what ought to be done and prohibits the contrary.

The classical jurists, in the golden age of juristic law making, discard the idea of authority and insist upon the idea of reason and justice.

Celsus (a jurist of the end of the first and beginning of the second century A.D.):

> *Ius est ars boni et aequi.* — Dig. I, 1, 1, § 1.
>
> Law is the art of what is right and equitable.

From the time of Diocletian (A.D. 284), imperial legislation becomes the growing point of the law, and the word *lex* begins to be used for law in general.

Note that while *Recht, droit, diritto, derecho,* all meaning etymologically that which is straight or right, are equivalents of *ius* and are generic terms, and *Gesetz, loi, legge, ley,* equivalents of *lex,* are employed properly for enactment, legislation, or rule, yet *loi, legge,* and *ley,* for the same reasons that led to the wider meaning of *lex,* are sometimes used for law in the wider sense.

3. Development of the Conception and Definition of Law from the Revival of Legal Study at Bologna (Twelfth Century) to the Time of Grotius (Seventeenth Century).

Corpus iuris ciuilis believed to be binding statute law, and hence *lex*.

Law made up of *corpus iuris* as interpreted by jurists and contemporary enactment, on the one hand, and of customary law of various peoples on the other. Hence:

Gratian (about 1150):

> *Ius generale nomen est: lex autem iuris est species. . . . omne autem ius legibus et moribus constat. Lex est constitutio scripta. Mos est longa consuetudo. . . . Consuetudo est ius quoddam moribus institutum, quod pro lege suscipitur cum deficit lex.* — CC. 2–5, Dist. I.

Ius is the genus and *lex* the species. All *ius* consists of enactments and customs. *Lex* is a written enactment. Custom is long usage. Usage is a certain kind of law, instituted by observance, which is held for enactment when enacted law is wanting.

All of these statements were taken from a treatise on the etymology of words by Isidorus Hispalensis (ob. 636). They illustrate the ideas of an age when Roman law was known as a body of enactments. These ideas are even more apparent in the writings of the period prior to the rise of the school at Bologna. Thus, in the Expositio Terminorum appended to the eleventh century Petri Exceptiones Legum Romanorum: *Ius est ars boni et equi. Lex est ius a peritis principibus constitutum.* (Right is the art of what is good and equitable. Law is right enacted by wise princes.) Also in the related Libellus de Uerbis Legalibus: *ius uero omne legibus constat et moribus. Lex est principum constitutio pro utilitate communi conscripta; mos autem est . . . lex non scripta.* (But all law consists of statutes and customs. Statute is the enactment of princes written for the common good; custom is unwritten law.) The absence of any real line between *ius* and *lex*, so far as the former has more than an ethical meaning, is noteworthy.

The influence of these ideas is apparent in the title "De Legibus et Consuetudinibus," borne both by Glanvill's treatise

(about 1189), and by Bracton's (about 1256–59), the first expositions of English law.

Glanvill: —

For the English laws, although not written, may as it should seem, and that without any absurdity, be termed laws (since this itself is a law — that which pleases the prince has the force of law). . . . For if from the mere want of writing only they should not be considered as laws, then unquestionably writing would seem to confer more authority upon laws themselves than either the equity of the persons constituting or the reason of those framing them. — De Legibus et Consuetudinibus Regni Angliae, Preface (Beames' transl. xi).

Theory of St. Thomas Aquinas (1225 or 1227–74):

The old *ius naturale* divided into

lex aeterna (eternal law), the " reason of the divine wisdom, governing the whole universe."

lex naturalis (natural law), the law of human nature proceeding ultimately from God, but immediately from human reason, and governing the actions of men only.

Positive law a mere recognition of the *lex naturalis*, which is above all human authority.

Thomas Aquinas: " An ordinance of reason for the common good, promulgated by him who has charge of the community." — Summa Theologiae, 1, 2, 8, 90, art. 1.

Accordingly, Fortescue (writing between 1463 and 1471), defines *lex* (used in the sense of positive law): —

Lex est sancio sancta, iubens honesta et prohibens contraria. — De Laudibus Legum Angliae, Cap. 3.

Law is a holy sanction, commanding what is right and prohibiting the contrary.

As this natural law was discoverable by reason, the obvious effect was to require all rules of positive law to be tested by reason. Hence: " The first is the law eternal. The second is the law of nature of reasonable creatures, the which, as I have heard say, is called by them that be learned in the law of England, the law of reason." — Doctor and Student (Temp. Henry VIII), Intr.

R. Suarez (1558):

Naturae lex est rationis regula unde lex humana tantum habet de ratione legis in quantum a lege naturae deriuatur; et si discordant in aliquo, non erit lex, sed legis corruptio. — Repetitiones, 272–3.

A law of nature is a rule of reason; wherefore a human law partakes of the reason of law in so far as it is derived from a law of nature. And if they disagree in anything, there is no law, but a corruption of law.

4. Development of the Conception and Definition from Grotius to Kant. (Seventeenth and Eighteenth Centuries.)

Grotius puts natural law on a rational instead of a theological basis.

Conring (1643) overturns the mediaeval notion of the statutory authority of the *corpus iuris*.

Thus natural law became once more *ius naturale*, the dictates of reason in view of the exigencies of human constitution and human society, no longer *lex naturalis*, the enactments of a supernatural legislator.

And positive law became the application of reason to the civil relations of men, of which the *corpus iuris* was an exponent only because and to the extent of its inherent reasonableness.

Grotius (1625): "A rule of moral actions obliging to that which is right." — De Jure Belli et Pacis, I, 1, § 4.

Montesquieu (1748): "Law in general is human reason." — L'Esprit des lois, Bk. I, Chap. 3.

In England, following the period of legislative energy during the Commonwealth, Hobbes saw chiefly the imperative element.

Hobbes (1651): "Civil law is to every subject those rules which the commonwealth hath commanded him . . . to make use of for the distinction of right and wrong; that is to say of what is contrary and what is not contrary to the rule." — Leviathan, Chap. 26.

On the continent, *lex* begins to stand for the rules of the civil law in each state.

Pufendorf (1672): *Lex est decretum, quo superior sibi subjectum obligat ut ad istius praescriptum actiones suas diriget.* — Elementa Jurisprudentiae Universalis, Def. 13.

"A law is an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former."

In the eighteenth century, the effect of an age of absolute governments in reviving the older conception of law as enactment, becomes well marked.

Burlamaqui (1747): "A rule prescribed by the sovereign of a society to his subjects." — Principes de Droit Naturel, I, 8, 2.

Rousseau (1762): "Law is the expression of the general will." — Contrat Social, Bk. 2, Chap. 6.

But the seventeenth-century conception persisted in juristic writing: —

A rule to which men are obliged to make their moral actions conformable. — Rutherforth, Institutes of Natural Law, Chap. 1, § 1 (1754).

Blackstone attempted to combine the two notions: —

A rule of civil conduct, prescribed by the supreme power in a state, prescribing what is right and prohibiting what is wrong. — Commentaries, I, 44 (1765).

5. Further Development from Kant to Jhering

(1) *Metaphysical*

Kant (1797): "The sum of the circumstances according to which the will of one may be reconciled with the will of another, according to a common rule of freedom." — Metaphysische Anfangsgründe der Rechtslehre, 27.

Savigny (1840): "Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to co-exist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined and through them this free opportunity is secured are the law." — System des heutigen römischen Rechts, I, § 52.

Krause (1828): "The organic whole of the external conditions of life measured by reason." — Abriss des Systemes der Philosophie des Rechtes, 209.

The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects. — Puchta, Cursus der Institutionen, I, § 6 (1841).

An aggregate of rules which determine the mutual relations of men living in a community. — Arndts, Juristische Encyklopädie, § 1 (1850).

The rule or standard governing as a whole the conditions for the orderly attainment of whatever is good, or assures good for the individual or society, so far as those conditions depend on voluntary action. — Ahrens, Philosophische Einleitung, in Holtzendorff, Encyklopädie der Rechtswissenschaft (1 ed. 1871). Transl. by Pollock.

The expression of the idea of right involved in the relation of two or more human beings. — Miller, Philosophy of Law, 9 (1884).

The aggregate of the rules which provide for the employment of the force of society to restrain those who infringe the liberty of others. — Acollas, Introduction à l'étude du droit, 2 (1885).

The sum of the conditions of social co-existence with regard to the activity of the community and of individuals. — Pulszky, Theory of Law and Civil Society, 312 (1888).

The sum of moral rules which grant to persons living in a community a certain power over the outside world. (Ledlie's transl.) — Sohm, Institutes of Roman Law (4 ed., 1889), § 7.

(2) *Eighteenth century and Rousseauist*

Those rules of intercourse between men which are deduced from their rights and moral claims; the expression of the jural and moral relations of men to one another. — Woolsey, International Law, § 3 (1871).

The recognition of the law of nature by special enactments and its vindication in special circumstances and relations. — Lorimer, Institutes of Law, 9 (1880).

The aggregate of received principles of justice. — Smith, Elements of Right and of the Law, § 231 (1887).

The will of the state concerning the civic conduct of those under its authority. — Woodrow Wilson, The State, § 1415 (1898).

A rule agreed upon by the people regulating the rights and duties of persons. — Andrews, American Law, § 72 (1900).

Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power. — Oppenheim, International Law, 1, § 5 (1905).

(3) *Later Historical*

The sum of the rules which fix the relations of men living in society, — or at least of the rules which are sanctioned by the society, — imposed upon the individual by a social constraint. — Brissaud, Manuel d'histoire du droit Français, 3 (1898).

The rule of conduct to which a society gives effect in respect to the behavior of its subjects toward others and toward itself and in respect to the forms of its activity. — Merkel in Holtzendorff, Encyklopädie der Rechtswissenschaft (5 ed. 1890), 5.

A rule expressing the relations of human conduct conceived as subject to realization by state force. — Wigmore, Cases on Torts, II, App. A, § 3 (1911).

(4) *Analytical*

i. *French. Influence of the French Code*

The civil law is, therefore, a rule of conduct upon a subject of common interest prescribed to all citizens by their lawful sovereign. It is the solemn declaration of the legislative power, by which it commands, under certain penalties or subject to certain rewards, what each citizen ought to do or not to do or to permit for the common good of society. — Toullier, Droit civil Français, I, § 14 (1808).

A law (*loi*) is a rule established by the authority which, according to the political constitution, has the power of commanding, or prohibiting, or of permitting throughout the State. A law truly and properly so-called, therefore, . . . is a rule sanctioned by the public power, a rule civilly and juridically obligatory. Law (*droit*) is the result, or better, the aggregate or totality of these rules. — Demolombe, Cours de Code Napoléon, I, § 2 (1845).

Law (*loi*) . . . is a rule established by a superior will in order to direct human actions. . . . The law (*droit*) . . . sometimes the rules of law (*lois*) seen in their aggregate, or more often the general result of their dispositions. — Demante, Cours analytique de code civil, I, §§ 1–2 (1849).

What is law (*droit*)? It is the aggregate, or rather the resultant, of the dispositions of the laws (*lois*) to which man is subjected, with the power of following or of violating them. . . . Now these laws (*lois*) are rules of conduct established by a competent authority. — Marcadé, Explication du Code Napoléon (5 ed. 1859), I, § 1.

One may say with Portalis that law (*la loi*) is a solemn declaration of the will of the sovereign upon an object of common interest. — Laurent, Principes du droit civil Français, I, § 2 (1878).

Obligatory rules of conduct, general and permanent, established for men by the temporal sovereign. — Vareilles-Sommières, Principes fondamentaux de droit, 12 (1889).

Law (*droit*) is the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows. The observance of which it is possible, and at the same time just and useful, to assure by way of external coercion. — Baudry-Lacantinerie, Précis de droit civil (10 ed. 1908), I, § 1.

ii. *Anglo-American*

First Stage. — The imperative theory perfected; eighteenth-century ideas eliminated.

Austin (1832): "The aggregate of rules set by men as politically superior or sovereign to men as politically subject." — Province of Jurisprudence Determined, Lect. I.

A command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority. — Amos, Science of Law, 48 (1874).

The general body of rules which are addressed by the rulers of the political society to the members of that society, and which are generally obeyed. — Markby, Elements of Law, § 9 (1871).

A law is a command; that is to say it is the signification by a law-giver to a person obnoxious to evil of the law-giver's wish that such person should do or forbear to do some act, with an intimation of an evil that will be inflicted in case the wish be disregarded. — Poste, Gaius, 2 (1871).

Second Stage. — Influence of the Historical School: Enforcement substituted for enactment.

Holland (1880): "A general rule of external human action enforced by a sovereign political authority." — Jurisprudence, Chap. 3.

Rules of conduct defined by the state as those which it will enforce, for the enforcement of which it employs a uniform constraint. — Anson, Law and Custom of the Constitution, I, 8 (1886).

The sum of the rules of justice administered in a state and by its authority. — Pollock, First Book of Jurisprudence, 17 (1896).

The aggregate of rules administered mediately or immediately by the state's supreme authority, or regulating the constitution and functions of that supreme authority itself; the ultimate sanction being in both cases disapproval by the bulk of the members of that state. — Clark, Practical Jurisprudence, 172 (1883).

Third Stage. — Enforcement by tribunals substituted for enforcement by the sovereign.

Dicey (1890): "The Law of every country . . . consists of all the principles, rules or maxims enforced by the courts of that country as being supported by the authority of the state." — Private International Law as a Branch of the Law of England, 6 Law Quart. Rev., 3.

The law or laws of a society are the rules in accordance with which the courts of that society determine cases, and by which, therefore, the members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them the law, is the fact that courts do act upon them. — Gray, Definitions and Questions in Jurisprudence, 6 Harvard Law Rev., 24 (1892).

The sum of the rules administered by courts of justice. — Pollock and Maitland, History of English Law, Introduction (1895).

The rules recognized and acted on in courts of justice. — Salmond, Jurisprudence, § 5 (1902).

6. German Definitions since Jhering. Influence of German Legislation

The sum of the rules of constraint which obtain in a state. — Jhering, Der Zweck im Recht, I, 320 (1877).

The rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force cannot

be called law. — Lasson, System der Rechtsphilosophie, 207 (1882).

Law is a peaceable ordering (*Friedensordnung*) of the external relations of men and their communities to each other. It is an ordering (*norma agendi*), a regulating through the setting up of commands and prohibitions. — Gareis, Encyklopädie der Rechtswissenschaft, § 5 (1887).

The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are norms or imperatives. — Bierling, Juristische Prinzipienlehre, I, § 3 (1894).

The legal order is an adjustment through coercion of the relations of human life arising in a social manner from the social nature of man. — Kohler, Einführung in die Rechtswissenschaft, § 1 (1902).

Law is the ordering of the relations of life guaranteed by the general will. — Dernburg, Das bürgerliches Recht des deutschen Reichs und Preussens, I, § 16 (1903).

Law is the ordering (*Ordnung*) based upon autonomous government in a state of civilization. — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, III, § 17 (1906).

V. THE NATURE OF LAW

Austin, Jurisprudence, Analysis of Lects. 1–6 (4 ed., 81–87), Lect. 1; Hobbes, Leviathan, Pt. II, Chap. 26, to 6; Holland, Jurisprudence, Chaps. 2, 3; Markby, Elements of Law, §§ 1–26; Pollock, First Book of Jurisprudence, Chap. 1; Salmond, Jurisprudence, §§ 5, 16, 17; Brown, The Austinian Theory of Law, §§ 552–639.

Clark, Practical Jurisprudence, Pt. I, Chaps. 7, 11–16; Maine, Early History of Institutions, Lect. 13; Lee, Historical Jurisprudence, 1–5; Carter, Law: Its Origin, Growth and Function, Lects. 1–8.

Jenks, Law and Politics in the Middle Ages, 1–6; Rattigan, Science of Jurisprudence, §§ 8–11*a*.

Miller, Data of Jurisprudence, Chaps. 4, 5; Miller, Lectures on the Philosophy of Law, Appendix A; Lorimer, Institutes of

Law, 255–259; Korkunov, General Theory of Law (transl. by Hastings), 40–165.

Gray, Nature and Sources of the Law, §§ 191–247; Gareis, Science of Law (transl. by Kocourek), § 5.

1. Analytical.

Austin's Analysis:

(1) Commands set by a sovereign to subjects.
(2) Rules set by a determinate authority.
(3) Rules of general application.
(4) Rules dealing with external human action.
(5) Sanction.

Modification by later analytical jurists:

> Law is that which is *enforced* by the state or by its judicial organs, not what is *set* by the state.

Recent German analysis [Binding, Die Normen und ihre Uebertretung (1872–1877)]:

> Law is a body of norms established or recognized by the state in the administration of justice.

(a) Rules
(b) Standards
(c) Principles
} of { Conduct / Decision

Characteristics of law in a developed system:

(1) Generality.
(2) Universality.
(3) Predicability.

> The body of rules and principles in accordance with which justice is administered by the authority of the state.

2. Historical.

Results of philological investigation.
Results of legal history.
Primitive law (1) has no imperative element.
(2) is not set by a determinate authority.
(3) has no sanction, or at least sanction is feebly developed.
(4) is recognized rather than enforced.

Historical view of sanction:

The habit of obedience (Maine).

The displeasure of one's fellowmen (Clark).

Public sentiment and opinion (see Lightwood, The Nature of Positive Law, 362, 389).

The social standard of justice (Carter).

3. Philosophical.

Law as an expression of ideas of right.

Law as a securing of interests.

Law as a delimitation of interests.

The " jural postulates " of civilization.

Philosophical jurists regard the sources of law rather than the nature of law.

4. Sociological.

The functional view of law — law as a social mechanism.

The legal order.

The body of rules, principles and standards established or recognized by organized human society for the delimitation and securing of interests.

5. Bodies or types of rules with reference to which theories of the nature of law must be tried.

(1) " Municipal " (civil) private law.

(2) Public law.

(a) Constitutional law.

(b) Administrative law.

(3) International law.

What have these in common?

How far are some of these to be called " law " ?

6. Analogous uses of the term " law."

Laws of nature or of science.

Laws of grammar, etc.

Laws of morals, fashion, etc.

Laws of games.

Analogies to legislation in rules governing modern games.

VI. LAW AND ETHICS

Austin, Jurisprudence, Lect. 5; Bentham, Theory of Legislation, Principles of Legislation, Chap. 12; Pollock, First Book of Jurisprudence, Pt. I, Chap. 2; Gray, Nature and Sources of the Law, §§ 642–657; Carter, Law: Its Origin, Growth and Function, Lect. 6; Amos, Science of Law, Chap. 3; Green, Principles of Political Obligation, §§ 11–31; Korkunov, General Theory of Law (transl. by Hastings), §§ 5–7; Gareis, Science of Law (transl. by Kocourek), § 6; Lorimer, Institutes of Law (2 ed.), 353–367; Jellinek, Die Sozialethische Bedeutung von Recht, Unrecht und Strafe, Chap. 2.

Rattigan, Science of Jurisprudence, §§ 4–4*a*; Dillon, Laws and Jurisprudence of England and America, 12–20; Woodrow Wilson, The State, §§ 1449–1456; Lightwood, The Nature of Positive Law, 362–368; Miraglia, Comparative Legal Philosophy (transl. by Lisle), §§ 119–127; Hegel, Philosophy of Right (transl. by Dyde), §§ 105–114; Miller, Philosophy of Law, Lect. 13; Hastie, Outlines of Jurisprudence, 17–20.

1. Historical View.

Law and morals have a common origin, but diverge in their development.

Four stages in the development of law in this respect may be noted:

(1) The stage of custom identical with morality.
(2) The stage of strict law — codified or crystallized custom which in time is outstripped by morality.
(3) The stage of infusion of morality.
(4) The stage of conscious law-making.

2. Philosophical View.

Older views.

Natural law and positive law.

Practical results of this notion in legal history.

The theory can be held with safety only at a time when absolute theories of morals obtain.

Newer views:

Teleological (Jhering).

The ideals of an epoch (Stammler).

Evolutionary (Kohler).

3. Analytical view:

Contact of law and morality in

(a) judicial law-making.

(b) interpretation and application of law.

(c) judicial discretion.

So far as a complete separation of judicial and legislative functions is possible, the distinction is —

Law is for the judge.

Morality is for the law-maker.

Distinction between law and morals in respect of application and subject-matter:

The latter looks to thought and feeling.

The former looks to acts.

Ethics aims at perfecting the individual character of men.

Law seeks only to regulate the relations of individuals with each other and with the state.

Moral principles must be applied with reference to circumstances and individuals.

Legal rules are typically of general and absolute application.

Law must act in gross, and so more or less in the rough.

Law does not necessarily approve what it does not condemn.

Resistance to law may be moral, but cannot be legal.

Developed law is and must be scientific.

VII. LAW AND THE STATE

Austin, Jurisprudence, Lect. 6; Salmond, Jurisprudence, §§ 59–69; Holland, Jurisprudence, Chap. 4; Bryce, Studies in History and Jurisprudence, Essay 10; Markby, Elements of Law, §§ 31–38; Maine, Early History of Institutions, Lect. 12; Jenks, Law and Politics in the Middle Ages, 68–71; Gray, Nature and Sources of the Law, §§ 169–183; Korkunov, General Theory of Law (transl. by Hastings), §§ 43–48; Gareis, Science of Law (transl. by Kocourek), § 46; Pollock, First Book of Jurisprudence (3 ed.), 257–275.

Clark, Practical Jurisprudence, 157–176; Carter, Law: Its Origin, Growth and Function, 187–190; Amos, Science of Law (2 ed.), 118–123; Hegel, Philosophy of Right (transl. by Dyde), §§ 257–360; Miller, Philosophy of Law, Lect. 7.

1. The Legal Theory of the State.

The purpose is to set forth the legal theory of the state.

Not political theories of the state.

Not philosophical theories of the state.

The legal theory has reference to the immediate practical source of rules and sanctions.

Political theories have reference to the ultimate practical source of rules and sanctions.

Philosophical theories have reference to the ultimate moral source of rules and sanctions.

A state is a permanent political organization, supreme within and independent of *legal* control from without.

The state as a person.

2. Anglo-American Theory of Sovereignty.

The state is the whole of the political society in its corporate aspect.

The sovereign is that organ or that complex of organs which exercises its governmental functions.

" Consent of the governed " is a political, not a legal theory.

Sovereignty is the aggregate of powers possessed by the ruler or the ruling organs of a political society.

It may be:

(a) Internal — the sovereign is legally paramount over all action within.

(b) External — the sovereign is independent of all legal control from without.

Powers of internal sovereignty.

The separation of powers.

Goodnow, Comparative Administrative Law, I, Chap. 3; Sidgwick, Elements of Politics, 363; Fuzier-Hermann, La séparation des pouvoirs, 181 ff.; Haurion, Principes de droit public, 446; Jellinek, Recht des modernen Staates (2 ed.) I, 483–487, 585–601; Schmidt, Allgemeine Staatslehre, I, 209–217; Treitschke, Politik (2 ed.) II, 131 ff.

The sovereign is incapable of legal limitation, but separate organs may be held to certain spheres or modes of action.

Legal and political sovereignty must be distinguished.

Sovereignty is a modern development.

3. Recent French Theories of Sovereignty.

VIII. JUSTICE ACCORDING TO LAW

Pollock, First Book of Jurisprudence, Pt. I, Chap. 2; Salmond, Jurisprudence, §§ 6, 7, 9, 10, 18–20, 26–29; Markby, Elements of Law, § 201; Amos, Science of Law, Chap. 14; Korkunov, General Theory of Law (transl. by Hastings), §§ 41, 49; Demogue, Les principes fondamentales du droit privé, Pt. I, Chaps. 2–3.

1. The administration of justice — the legal order.

Regulative systems for maintaining right by external control:

(a) Religion.
(b) Public opinion.
(c) Administration of justice by the state.

2. Justice without law.

Law is not theoretically essential to the administration of justice.

Examples of justice without law:

In legal history.

In modern states.

Salmond, First Principles of Jurisprudence, 89–90; Grotius, De Jure Belli et Pacis (Whewell's transl.) II, 26, 1; Ahrens, Cours de droit naturel (8 ed.) I, 177; Lasson, Rechtsphilosophie, 238–239; Gareis, Science of Law (transl. by Kocourek) § 6; Pulszky, Theory of Law and Civil Society, § 174; Stammler, Theorie der Rechtswissenschaft, 134–136.

3. Justice according to law.

Law means uniformity of judicial and magisterial action, — generality, equality and certainty in the administration of justice.

Advantages of law:

(1) Law makes it possible to predict the course which the administration of justice will take.
(2) Law secures against errors of individual judgment.
(3) Law secures against improper motives on the part of those who administer justice.

(4) Law provides the magistrate with standards in which the settled ethical ideas of the community are formulated.
(5) Law gives the magistrate the benefit of all the experience of his predecessors.
(6) Law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests.

Disadvantages of law:

(1) Rules must be made for cases in gross and men in the mass and must operate impersonally and more or less arbitrarily.
(2) Science and system carry with them a tendency to make law an end rather than a means.
(3) Law begets more law, and a developed system tends to attempt rules where rules are not practicable and to invade the legitimate domain of justice without law.
(4) As law formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present; there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice.

Salmond, First Principles of Jurisprudence, 90–92; Korkunov, General Theory of Law (transl. by Hastings), 326–327, 394–395; Pound, Causes of Popular Dissatisfaction with the Administration of Justice, Rep. Am. Bar Ass'n XXIX, 395, 397–402.

4. Legislative justice.

Sidgwick, Elements of Politics, 355–356, 360, 482–484.

Examples of legislative justice:

(1) Greek trials before popular assemblies
(2) Roman capital trials before the people and appeals to the people in criminal causes.
(3) Germanic administration of justice by assemblies of free men.
(4) Judicial power of the English parliament.
    (a) Error and appeal in the House of Lords
    (b) Impeachments
    (c) Bills of attainder and of pains and penalties
    (d) Divorce bills
(5) Jurisdiction of the French senate to "pass judgment upon the President of the Republic and the ministers and to take cognizance of attacks upon the security of the state"
(6) Judicial power of the German Bundesrath
(7) Judicial powers of American colonial legislatures and state legislatures immediately after the Revolution
    (a) Bills of attainder
    (b) Bills of pains and penalties

(c) Appeal and error
(d) Legislative granting of new trials
(e) Divorce
(f) Insolvency

(8) Legislative justice in America today
(a) Impeachment
(b) Claims against the state

Defects of legislative justice.

(1) In practice legislative justice has proved unequal, uncertain and capricious.

Wooddesson, Lectures, II, Lect. 41; Tucker's Blackstone, I, 292–294; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 81, 147, 171; Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

(2) The influence of personal solicitation, lobbying and even corruption has been very marked.

Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153; Pierce *v.* State, 13 N. H. 536, 557; Debates of Pennsylvania Constitutional Convention (1873) III, 5–20.

(3) Legislative justice has always proved highly susceptible to the influence of passion and prejudice.

Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 147, 157, 162; Tucker's Blackstone, I, 293; Trial of Judge Addison, 7–15; Loyd, Early Courts of Pennsylvania, 143, 146; Trial of Andrew Johnson (Official ed.) I, 674, 693, 696-7, 698–700; Stephen, History of the Criminal Law, I, 160; Lovat-Fraser, The Impeachment of Lord Melville, 24 Juridical Rev. 235.

(4) Purely partisan or political motives have preponderated as grounds of decision.

See the last three citations next above; Atlay, Victorian Chancellors, I, 144–5; Campbell, Lives of the Lord Chancellors, VIII, 144–6; Browne, The New York Court of Appeals, 2 Green Bag, 277–8.

(5) Legislators who have not heard all the evidence have habitually participated in argument and decision; and those who have not heard all the arguments have habitually taken part in the decision.

See the record of attendance and voting in the Impeachment of Cox (Minnesota, 1881).

On the psychology of legislative justice, see Ross, Social Psychology, 57; Le Bon, The Crowd, Chap. 5; Sidis, Psychology of Suggestion, 299.

5. Executive Justice.

Pound, Executive Justice, 55 Am. Law Reg. 137; Goodnow, The Growth of Executive Discretion, Proc. Am. Pol. Sci. Ass'n II, 29; Powell, Judicial Review of Administrative Action in Immigration Proceedings, 22 Harv. Law Rev. 360.

In legal history.

In the Anglo-American polity.

Law and Administration in nineteenth-century America.

The Reaction in America.

Boards of Health, etc.
Public Utility Commissions
Boards of Engineers, etc.
Industrial Commissions
Probation Commissions
Pure Food Commissions
Administrative powers in immigration .

Analogy in English law in the sixteenth century.

The balance between law and administration.

The advantages claimed for executive justice are those claimed for justice without law.

(1) Directness
(2) Expedition
(3) Conformity to popular will for the time being
(4) Freedom from the bonds of purely traditional rules
(5) Freedom from technical rules of evidence and power to act upon the everyday instincts of ordinary men.

The defects of executive justice are those of justice without law.

Forms and rules, by compelling deliberation, guard against suggestion and impulse and insure the application of reason to the cause.

In time administrative tribunals have always turned into ordinary courts.

6. Judicial Justice.

Bluntschli, Theory of the State (3 Oxford ed.) 523; Lieber, Civil Liberty and Self-Government, Chaps. 18, 19; Burgess, Political Science and Constitutional Law, II, 356–366; Baldwin, The American Judiciary, 1–98 ; Brown, Judicial Independence, Rep. Am. Bar Ass'n, XII, 265; Root, Judicial Decisions and Public Feeling, 35 Rep. N. Y. State Bar Ass'n, 148; Pound, Social Problems and the Courts, 18 Am. Journ. Sociol. 331.

Setting off of the judicial function has been a gradual process. Objections urged against judicial justice:

(1) That it is too rigid and does not allow sufficient play to the non-legal conscience in the ascertaining or in the applying of the law.
(2) That the premises employed in judicial justice are too narrow and pedantic and the fundamental principles too fixed, so that judicial justice is too slow in responding to the environment in which it must operate.
(3) That it is characterized by a tendency to reduce to rule, along with those things which demand rule, those with respect to which detailed rules are not practicable.

These objections amount to this: That judicial justice realizes justice according to law most completely and so brings out its defects as well as its excellencies.

Advantages of judicial justice:

(1) It combines the possibilities of certainty and of flexibility better than any other form of administering justice.
(2) There are checks upon the judge which do not obtain or are ineffective in case of legislative and executive officers.
(3) Because of training in and habit of seeking and applying principles when called on to act and because their decisions are subject to expert criticism, judges will stand for the law against excitement and clamor.

Rutgers *v.* Waddington, 1 Thayer, Cas. Const. L. 63; Bayard *v.* Singleton, 1 Martin (N. C.) 42; Brown *v.* Leyds, 14 Cape Law Journ. 71, 84; Littleton *v.* Fritz, 65 Ia. 488; Sims' Case, 7 Cush. 285; The Case of Thomas Sims, 14 Monthly Law Reporter, 1; The Removal of Judge Loring, 18 Monthly Law Reporter, 1.

4

THE SCOPE AND SUBJECT-MATTER OF LAW

IX. INTERESTS

A

Interests to be Secured

Ritchie, Natural Rights; Spencer, Justice, Chaps. 9–18; Paulsen, Ethics (Thilly's transl.), 633–637; Green, Principles of Political Obligation, §§ 30–31; Lorimer, Institutes of Law, Chap. 7; Demogue, Notions fondamentales du droit privé, 405–443.

Ahrens, Cours de droit naturel (8 ed.), II, §§ 43–88; Hegel, Philosophy of Right (Dyde's transl.), §§ 34–104; Fichte, Science of Rights (Kroeger's transl.), 298–343, 391–469; Beaussire, Les principes du droit, Bk. III; Lasson, System der Rechtsphilosophie, §§ 48–56; Boistel, Philosophie du droit, I, §§ 96–241; Kohler, Lehrbuch der Rechtsphilosophie, 91–142.

1. *Individual*

Jethro Brown, The Underlying Principles of Modern Legislation, Chaps. 7, 8.

Lioy, Philosophy of Right (Hastie's transl.), II, Chap. 1. "The public good is in nothing more essentially interested than in the protection of every individual's private rights." — 1 Blackstone, Commentaries, 139. "Two fundamental tendencies, which are characteristic of English thinking with respect to the relation of the individual to the state and have found more marked expression in English law making than in any other, put their stamp upon Locke's philosophy of law and of the state: unlimited high valuing of individual liberty and respect for individual property." — Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 160 (The World's Legal Philosophies, 137).

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space." — Wundt, Ethics (transl. by Titchener and others), III, 160.

i. *Personality*

Gareis, Science of Law (Kocourek's transl.), 122–135; Adler, Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch (in the Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches); Geyer, Geschichte und System der Rechtsphilosophie, 137–142; Stahl, Philosophie des Rechts (5 ed.), 312–350.

a. *The physical person*

Green, Principles of Political Obligation, §§ 148–156.

Miller, Lectures on the Philosophy of Law, Lect. XI; Amos, Systematic View of the Science of Jurisprudence, 287–297; Post, Ethnologische Jurisprudenz, II, § 102; 1 Blackstone, Commentaries, 129–138.

b. *Honor — Reputation*

Dewey and Tufts, Ethics, 85–89; Westermarck, Origin and Development of the Moral Ideas, Chap. 32; Post, Ethnologische Jurisprudenz, II, §§ 17, 103; Institutes of Justinian, IV, 4; Sohm, Institutes of Roman Law (Ledlie's transl., 2 ed.), § 36.

c. *Belief and opinion*

Pollock, Essays in Jurisprudence and Ethics, 144–175; Mill, On Liberty, Chap. 2; Stephen, Liberty, Equality, Fraternity, Chap. 2.

ii. *Domestic relations*

Miller, Philosophy of Law, Lect. 6; Lioy, Philosophy of Right (Hastie's transl.), II, Chap. 2; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 17–24; Kohler, Lehrbuch der Rechtsphilosophie, 66–81; Post, Zur Entwickelungsgeschichte des Familienrechts.

iii. *Substance*

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, vol. IV; Letourneau, Property, Its Origin and Development.

Gareis, Science of Law (Kocourek's transl.), §§ 19–23; Schuppe, Grundzüge der Ethik und Rechtsphilosophie, §§ 87–96; Demogue, Notions fondamentales du droit privé, 383–404.

a. *Property*

Green, Principles of Political Obligation, §§ 211–231; Stimson, Popular Law Making, chap. 7.

Miller, Philosophy of Law, Lect. 5; Herkless, Jurisprudence, Chap. 10; Amos, Systematic View of the Science of Jurisprudence, Chap. 10; Grasserie, Les principes sociologiques du droit civil, Chap. 13; Kohler, Lehrbuch der Rechtsphilosophie, 81–91.

Coulanges, Ancient City, Bk. 2, Chap. 6; Maine, Ancient Law (American ed.), 237–294; Maine, Early History of Institutions (American ed.), 98–118; Maine, Early Law and Custom (American ed.), 335–361; Jenks, Law and Politics in the Middle Ages, 148–184, 188–241.

Succession and Testamentary Disposition

Kohler, Rechtsphilosophie und Universalrechtsgeschichte, §§ 25–27; Kohler, Lehrbuch der Rechtsphilosophie, 132–142; Grasserie, Les principes sociologiques du droit civil, Chaps. 11, 12.

Coulanges, Ancient City, Bk. 2, Chap. 7; Maine, Early Law and Custom (American ed.), 78–121; Maine, Ancient Law (American ed.), 166–208, 209–236; Gaius, III, § 1 and §§ 9–26; Salic Law (transl. in Henderson, Historical Documents of the Middle Ages), tit. 59; Pollock and Maitland, History of English Law, Bk. II, Chap. 6, §§ 1, 3.

b. *Freedom of industry and contract*

Green, Principles of Political Obligation, § 210; Pound, Liberty of Contract, 27 Yale Law Journ. 454; Stimson, Popular Law Making, Chaps. 8, 11.

c. *Promised advantages*

Amos, Systematic View of the Science of Jurisprudence, Chap. 11; Herkless, Jurisprudence, Chap. 12; Kohler, Lehrbuch der Rechtsphilosophie, 91–132; Grasserie, Les principes sociologiques du droit civil, Chap. 6.

d. *Advantageous relations with others*

Contractual,
Social,
Business,
Official,
Domestic.

The "Right of Association"

Dicey, Law and Opinion in England, 95–102, 190–200, 266–272, 465–475; Stimson, Popular Law Making, Chaps. 9, 12; Duguit, Le droit social et le droit individuel, 107–143.

2. *Public*

Jellinek, System der subjektiven öffentlichen Rechte (2 ed.); Jellinek, Allgemeine Staatslehre (2 ed.), 162–166; Salmond, Jurisprudence, § 119; Gareis, Science of Law (transl. by Kocourek), § 47.

Interests
- Of the state as a juristic person
  - personality
  - substance
- Of the state as guardian of social interests

3. *Social*

Green, Principles of Political Obligation, §§ 207–209, 233–246; Jhering, Der Zweck im Recht (3 ed.), I, 452–466.

i. *General security*

- Safety,
- Health,
- Peace and order,
- Security of transactions,
- Security of acquisitions.

ii. *General morals*

iii. *Security of social institutions*

iv. *Use and conservation of natural media*

v. *Protection of defectives and dependents*

vi. *Individual moral and social life*

X. THE SECURING OF INTERESTS

A

Balancing of Interests

Korkunov, General Theory of Law (Hastings' transl.), § 25; Kantorowicz, Rechtswissenschaft und Soziologie, 17–23; Demogue, Notions fondamentales du droit privé, 170–200.

B

Means of Securing Interests

Salmond, Jurisprudence, Chaps. 4, 10, 11; Saleilles, The Individualization of Punishment (Mrs. Jastrow's transl.), Chaps. 2–7; Bryce, Studies in History and Jurisprudence, Essay 9; Stammler, Wirthschaft und Recht, §§ 92–98.

Bentham, Theory of Legislation (Hildreth's transl.), Principles of Legislation, Chaps. 7–11, Principles of the Penal Code, Pt. 3; Austin, Jurisprudence (4 ed.), I, 91 ff.; Pollock, First Book of Jurisprudence (3 ed.), 21–27; Salmond, Jurisprudence, § 32.

1. *Rights*
2. *Powers*
3. *Privileges*
4. *Punishment*
5. *Redress*
   i. *Specific*
   ii. *Substitutional*
6. *Prevention*

C

LIMITS OF EFFECTIVE LEGAL ACTION

1. *Limits in respect of application and subject-matter*

Bentham, Theory of Legislation, Principles of Legislation, Chap. 12; Pollock, First Book of Jurisprudence, Pt. 1, Chap. 2; Amos, Science of Law, Chap. 3; Green, Principles of Political Obligation, §§ 11–31; Korkunov, General Theory of Law (Hastings' transl.), §§ 5–7; Gareis, Science of Law (Kocourek's transl.), § 6. See outline of Lect. VI, *supra*.

2. *Social-psychological limitations upon enforcement of legal rules*

Spinoza, Tractatus Politicus, Chap. 10, § 5 (Elwes' transl., p. 381); Duff, Spinoza's Political and Ethical Philosophy, Chap. 22; Markby, Elements of Law, §§ 48–59; Salmond, Jurisprudence, § 30; Jellinek, Allgemeine Staatslehre (2 ed.), 324 ff.

5

SOURCES, FORMS, MODES OF GROWTH

XI. SOURCES AND FORMS OF LAW

Austin, Jurisprudence, Lect. 28; Holland, Jurisprudence, Chap. 5 to I; Salmond, Jurisprudence, §§ 31–36; Amos, Science of Law (2 ed.), table facing page 76; Pollock, First Book of Jurisprudence (3 ed.), 227–242; Gray, Nature and Sources of the Law, §§ 322–597; Gareis, Science of Law (transl. by Kocourek), §§ 8–12; Korkunov, General Theory of Law (transl. by Hastings), §§ 51–54.

Carter, The Ideal and the Actual in the Law, 9–11; Carter, Law: Its Origin, Growth and Function, Lect. 5; Miraglia, Comparative Legal Philosophy (transl. by Lisle), §§ 152–165.

Austin, Jurisprudence, Lect. 30; Holland, Jurisprudence, Chap. 5, Subdiv. I; Clark, Practical Jurisprudence, 324–334; Salmond, Jurisprudence, §§ 42, 43, 46–48; Pollock, First Book of Jurisprudence (3 ed.), 276–286; Gray, Nature and Sources of the Law, §§ 598–641.

Rattigan, Science of Jurisprudence, §§ 72–74; Jenks, Law and Politics in the Middle Ages, 56–63; Hastie, Outlines of Jurisprudence, 37–39.

1. Sources and forms of law in general.
   Ambiguity of " sources of law " as used in the books.
   The source of authority of legal rules.
   The methods and agencies by which rules are formulated.
   The authoritative shapes which legal rules assume; the forms in which they are expressed and to which courts are referred in the decision of controversies.

2. Sources of law.
   A. Custom as a source of law — customary law.
      (1) Historical.
      The judge precedes the law; judgments precede customary law.
      Historical development of customary law.
      Relation of customary law to the development of the state.

Bryce, Studies in History and Jurisprudence, 280–284; Markby, Elements of Law, §§ 79–85.

(2) Philosophical.

The philosophical basis of customary law.

Lorimer, Institutes of Law (2 ed.) 515–516; Pollock, Essays in Jurisprudence and Ethics, 53–59; Kohler, Einführung in die Rechtswissenschaft, § 5; Stammler, Theorie der Rechtswissenschaft, 114–136.

(3) Analytical.

Nature of "customary law."

Customary course of popular action.

Customary course of magisterial action.

Customary course of advice to litigants by those learned in the law.

Customary course of judicial action.

Reaction of law and custom.

Theories of the formulation of law by custom.

Relation of custom to legislation.

Relation of custom to judicial decision.

Customary law and democracy.

Amos, Science of Law (2 ed.), 390.

(4) Customary law in the several legal systems.

(a) In Roman law.

(b) In the common law.

Brown, The Austinian Theory of Law, §§ 569–605; Markby, Elements of Law, §§ 90–91; Clark, Practical Jurisprudence, 316–323.

(c) Custom in international law.

Oppenheim, International Law, I, §§ 16–17.

B. Sources in general.

Sources in archaic law.

Sources in the Roman law.

Sources in the law of Continental Europe.

Sources in Anglo-American law.

Enacted law.

Not enacted.

Judicial.
Non Judicial.
Books of authority.
Writings not of authority.

3. Forms of law.
   1. Legislation.
   2. Case law.
   3. Text-book law.

Forms in the Roman law.

Legislation { *leges.* / *plebiscita.* / *senatus consulta.* / constitutions of the emperors (*principum placita*).

Edicts of the Magistrates.
Responsa of the jurisconsults.
Treatises of the jurisconsults.

Forms in the law of Continental Europe.
Legislation.
Jurisprudence (*Gerichtsgebrauch*).
Doctrine.

Forms in Anglo-American law.
Legislation — with us, constitutions, treaties, statutes.
Judicial decisions.
Authoritative books.

XII. THE TRADITIONAL ELEMENT

A

Law as a Priestly Tradition

Maine, Ancient Law, Chap. 1, and Sir Frederick Pollock's notes B and C; Maine, Early Law and Custom (American ed.), 45–49; Coulanges, Ancient City, Bk. 3, Chap. 11; Mayne, Hindu Law, §§ 14–40; Hirzel, Themis, Dike und Verwandtes.

B

Law as a Popular Tradition

Brunner, Deutsche Rechtsgeschichte, §§ 13, 37; Siegel, Deutsche Rechtsgeschichte, § 2.

C

Law as a Juristic Tradition

Clark, Practical Jurisprudence, 273–339; Muirhead, Historical Introduction to the Private Law of Rome, §§ 50, 61–64; Maitland, English Law and the Renaissance, 24–35; Holdsworth, History of English Law, II, 405–431; Grueber, Introduction to Ledlie's Translation of Sohm, Institutes of Roman Law (1 ed.); Dernburg, Pandekten, I, §§ 16–17; Windscheid, Pandekten, I, §§ 7–10; Brissaud, Manuel d'histoire du droit civil Français, 348–361, 388–400; Stintzing, Geschichte der deutschen Rechtswissenschaft.

D

Modes of Growth

1. *Fictions*

Maine, Ancient Law, Chap. 2, and Sir Frederick Pollock's note; Austin, Jurisprudence (3 ed.), 629–631; Phelps, Juridical Equity, § 150.

Bernhöft, Zur Lehre von den Fiktionen; Demogue, Notions fondamentales du droit privé, 238–251; Stammler, Theorie der Rechtswissenschaft, 328–333.

Gaius, IV, §§ 32–38; 3 Blackstone, Commentaries, 43, 44–45, 152–153, 159–165, 200–206, 274–275, 283, 284–287; Gaius, I, §§ 111, 114–115, 119–123, 132, 134, II, §§ 24, 103–105; Ulpian, Rules, I, §§ 7, 8; 2 Blackstone, Commentaries, 348–363, particularly 360, 363; Curtis, Jurisdiction of the United States Courts, 127–133.

2. *Interpretation*

Clark, Practical Jurisprudence, 235–244; Austin, Jurisprudence (3 ed.), 1023–1036; Pound, Spurious Interpretation, 7 Columbia Law Rev., 379; Gray, Nature and Sources of the Law, §§ 370–399; Stammler, Theorie der Rechtswissenschaft, 558–652.

Salkowski, Roman Private Law (Whitfield's transl.), § 5; Walton, Introduction to Roman Law (2 ed.), 110–111; 2 Blackstone, Commentaries, 333–337.

3. *Equity*

Maine, Ancient Law, Chap. 3, and Sir Frederick Pollock's note F; Clark, Practical Jurisprudence, 340–379.

Austin, Jurisprudence, Lect. 36; Salmond, Jurisprudence, § 15; Sohm, Institutes of Roman Law (Ledlie's transl., 2 ed.), §§ 15–17; Markby, Elements of Law, §§ 120–122; Pound, The Decadence of Equity, 5 Columbia Law Rev., 20.

4. *Natural law*

Bryce, Studies in History and Jurisprudence, Essay XI; Maine, Ancient Law, Chaps. 3, 4, and Sir Frederick Pollock's notes F, G, and H; Pollock, The Expansion of the Common Law, 107–138; Holland, Jurisprudence, Chap. 3, Subdiv. I; Korkunov, General Theory of Law (transl. by Hastings), §§ 14–17.

Pollock, History of the Law of Nature, 1 Columbia Law Rev. 11; Salmond, The Law of Nature, 11 Law Quart. Rev. 121; Grueber, Einführung in die Rechtswissenschaft (in Birkmeyer, Encyklopädie der Rechtswissenschaft), § 2; Grotius (Whewell's transl.) I, 1, §§ 10–11; Markby, Elements of Law, §§ 116–117; Rattigan, Science of Jurisprudence, §§ 13, 20*b*.

5. *Juristic science*

Austin, Jurisprudence (3 ed.), 653–659; Gray, The Nature and Sources of the Law, §§ 551–597*a*; Korkunov, General Theory of Law (Hastings' transl.), § 64; Bierling, Juristische Prinzipienlehre, IV, §§ 53–58; Stammler, Theorie der Rechtswissenschaft, 262–363; Demogue, Notions fondamentales du droit privé, 225–238.

Gareis, Science of Law (Kocourek's transl.), § 12 *c*; Sohm, Institutes of Roman Law (Ledlie's transl., 2 ed.), §§ 18–20; Beseler, Volksrecht und Juristenrecht, 299–364; Windscheid, Pandekten, I, §§ 23–24; Dernburg, Pandekten, I, § 38; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 11; Geny, Les procédés d'élaboration du droit civil (in Les méthodes juridiques); Del Vecchio, Il sentimento giuridico.

6. *Judicial empiricism*

Austin, Jurisprudence, Lects. 38 and 39, Pt. I; Pollock, Essays in Jurisprudence and Ethics, 237–261; Gray, Nature and Sources of the Law, §§ 420–550; Clark, Practical Jurisprudence, 223–226, 255–265; Dillon, Laws and Jurisprudence of England and America, 229–237, 242–253.

Markby, Elements of Law, §§ 95–99; Cruet, La vie du droit et l'impuissance des lois; Carter, Law: Its Origin, Growth and Function.

7. *Comparative law*

Bryce, Studies in History and Jurisprudence (American ed.), 619–623; Maine, Village Communities (American ed.), 3–6; Demogue, Notions fondamentales du droit privé, 268–285.

Meili, Institutionen der vergleichenden Rechtswissenschaft; Bernhöft, Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft; Jitta, La substance des obligations dans le droit international privé, § 7.

8. *Sociological study*

Holmes, The Path of the Law, 10 Harv. Law Rev. 456, 467 ff.; Keasbey, The Courts and the New Social Questions, 24 Green Bag, 114; Kantorowicz, Rechtswissenschaft und Soziologie, 8 ff.

XIII. THE IMPERATIVE ELEMENT

A

Legislative Law-making

Korkunov, General Theory of Law (Hastings' transl.), § 54; Salmond, Jurisprudence, §§ 50–54; Miller, Data of Jurisprudence, 238–258.

Maine, Early History of Institutions (American ed.), 386–393, 398–400; Clark, Practical Jurisprudence, 202–213.

1. *Unconscious legislation*

Maine, Village Communities (American ed.), 75, 116.

2. *Declaratory legislation*

Maine, Early History of Institutions (American ed.), 26 ff.

Laws of Manu (Bühler's transl.), I, §§ 58–60; Introduction to the Senchus Mor, Ancient Laws and Institutes of Ireland, I, 3–41; Prologue to the Lex Salica (Hesscls and Kern, Lex Salica, 422–423); Jenks, Law and Politics in the Middle Ages, 7–13.

3. *Selection and amendment*

Carter, Law: Its Origin, Growth and Function, 255 ff.

Prologue to Alfred's Laws (Thorpe, Ancient Laws and Institutes of England), 59; Laws of Howel the Good, Introduction (Evans, Welsh Mediaeval Law, 145–146).

4. *Conscious constructive law-making*

Jenks, Law and Politics in the Middle Ages, 18–21; Dicey, Law and Opinion in England, 45 ff., 48–61; Miller, Philosophy of Law, 38 ff.; Pulszky, Theory of Law and Civil Society, § 245.

5. *Codification*

See Lecture XIV., *post*.

B

Agencies of Legislation

1. *Roman law*

Gaius, I, §§ 3–7; Institutes, I, 2, §§ 3–10.

2. *English law*

Pollock, First Book of Jurisprudence, Pt. 2, Chap. 7.

Thring, Practical Legislation; Ilbert, Legislative Methods and Forms.

3. *American law*

Jones, Statute Law-Making in the United States.

McCarthy, The Wisconsin Idea, Chaps. 8, 9; Parker, The Congestion of Law, 29 Rep. Am. Bar Ass'n, 383; Parker, Address as President of the American Bar Ass'n, 1907, 19 Green Bag, 581; Burges, Address as President of the Texas Bar Ass'n, Proc. Tex. Bar Ass'n, 1910, 113–131.

4. *The civil law*

Gareis, Science of Law (Kocourek's transl.), § 11; Bekker, Grundbegriffe des Rechts und Misgriffe der Gesetzgebung, Chap 8; Geny, La technique législative dans la codification civile moderne, Livre du centennaire du code civil Français, II, 989–1038; Moreau, La revision du code civil et la procédure législative, Id., 1041–1071.

C

Relation of the Imperative to the Traditional Element

Savigny, On the Vocation of Our Age for Legislation and Jurisprudence (Haywood's transl.); Carter, Law: Its Origin, Growth and Function, 204–220; Dicey, Law and Opinion in England, 393–396; Pound, Common Law and Legislation, 21 Harv. Law Rev. 383; Holland, Jurisprudence (9 ed.), 71–72.

1. *Mutual reaction of the traditional and imperative elements*

Dicey, Law and Opinion in England, 369–392, 396. See Smart *v.* Smart [1892], A. C. 425, 432.

2. *The traditional element as a means of interpretation*

Carter, Law: Its Origin, Growth and Function, 309 ff.; Baldwin, The American Judiciary, 81–97; Charmont et Chausse, Les Interprètes du code civil, Livre du centennaire du code civil Français, II, 133–172; Endemann, Lehrbuch des bürgerlichen Rechts, I, § 12.

3. *Analogical reasoning from legislation*

Schuster, German Civil Law, § 17; Stammler, Theorie der Rechtswissenschaft, 633–641; Capitant, Introduction à l'étude du droit civil, 81–85.

4. *Adjustment of the traditional element to legislation and vice versa*

Gray, Nature and Sources of Law, §§ 369–399.

XIV. CODIFICATION

Austin, Jurisprudence, Lect. 39 and Notes on Codification (3 ed., pp. 1056–1074); Carter, Law: Its Origin, Growth and Function, Lects. 11, 12; Clark, Practical Jurisprudence, 380–394; Dillon, Laws and Jurisprudence of England and America, 178–187; Goadby, Introduction to the Study of Law, Chap. 4.

Amos, Science of Law, Chap. 13; Amos, Systematic View of the Science of Jurisprudence, 471–490; Bryce, Studies in History and Jurisprudence (American ed.), 103-105; Clarke, The Science of Law and Law-Making (this whole book is an argument against codification); Danz, Die Wirkung der Codificationsformen auf das materielle Recht; Demogue, Notions fondamentales du droit privé, 207 ff., and recent French literature cited in note 2; Goudy, Mackay and Campbell, Addresses on Codification of Law; Gregory, Benthamite Codification, 13 Harv. Law Rev. 374; Holland, Essays in the Form of the Law; Hearn, Theory of Legal Rights and Duties, Chap. 17; Pollock, First Book of Jurisprudence (3 ed.), 361 ff.; Pulszky, Theory of Law and Civil Society, §§ 246–247; Salmond, Jurisprudence (3 ed.), § 53; Bentham, Letters to the Citizens of the Several American United States (on codification); Report of Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes, and Luther S. Cushing, Commissioners "to take into consideration the practica-

bility and expediency of reducing to a written and systematic code the common law of Massachusetts or any part thereof," 1836 (reprinted by David Dudley Field, 1882); Bacon, Proposition to His Majesty Touching the Compilation and Amendment of the Laws of England, Spedding, Letters and Life of Bacon, VI, 61–71; Terry, Leading Principles of Anglo-American Law, §§ 606–612.

Sharswood, Law Lectures, Lect. 9; Pollock, Essay on Codification (prefaced to 4 ed. of his Digest of the Law of Partnership); Warren, History of the American Bar, Chap. 19; Chalmers, An Experiment in Codification, 2 Law Quart. Rev. 125.

Schuster, The German Civil Code, 12 Law Quart. Rev. 17; Endemann, Lehrbuch des bürgerlichen Rechts, I, §§ 3, 4. Reference should be made also to the various papers in the Livre du centennaire du code civil Français; De Colyar, Jean Baptiste Colbert and the Codifying Ordinances of Louis XIV, Journ. Soc. Comp. Leg. (n.s.), XIII, 56; Lobingier, Codification in the Philippines, Journ. Soc. Comp. Leg. (n.s.), X, 239.

1. The so-called ancient codes, more or less authoritative publications of traditional law, are generically distinct. They come before a period of legal development. Codes in the modern sense come after a full legal development and simplify the form of the law.

2. Codification in Roman law.
   - The compilations of Gregorius and Hermogenianus (fourth century A.D.).
   - The Theodosian Code (A.D. 429–438. Took effect 439).
   - The Codification of Justinian (A.D. 528–534).
     - The Code (529, revised and re-enacted 534)
     - The Digest (533)
     - The Institutes (533)
     - The Novels.

3. Modern Codes.
   - The Constitutio Criminalis Carolina (1532).
   - Partial codification under Louis XIV in France.
   - The project of Colbert (1667–1670).
   - The Prussian Code.
     - The draft code of Frederick the Great (1749)
     - The *Allgemeines Landrecht* (1780–1794)
   - The French Civil Code (1800–1804).
     - Adopted in Belgium, Egypt, and Polish Russia
     - Taken as the model in
       - Italy (1865)
       - Spain (1889)

Portugal (1865)
Holland (1838)
Russia (1835. A project on German lines is now pending)
Louisiana (1808, rev. 1824, 1870)
Quebec (1866)
Rumania (1864)
Montenegro (1873–1886)
Mexico (1870, rev. 1884)
Costa Rica (1886)
Guatemala (1886)
Bolivia (1830, rev. 1903)
Peru (1851)
Chili (1855)
Colombia (1857)
Argentina (1869)
Uruguay (1869)
Ecuador (1887)
Venezuela (1897)

The Austrian Civil Code (1713–1811).

Projected 1713, draft 1767, partial new draft 1787, put in force 1811.
Taken as a model in
Servia (1844)

The German Civil Code (1874–1900).

First commission appointed 1874, first draft published 1887, new commission 1890, new draft 1896, took effect 1900.
Taken as a model in
Japan (1896, took effect 1900)
Switzerland (1912)

Two classes of countries have adopted codes:

(a) Countries with well developed legal systems which had exhausted the possibilities of juristic development through the traditional element and required a new basis for a new juristic development.

(b) Countries which had their whole legal development before them; which required an immediate basis for development.

Conditions which have led to codification:

(1) The possibilities of juristic development on the basis of the traditional element were exhausted

for the time being, or a new basis was required for a country with no juristic past.

(2) The law was unwieldy, full of archaisms and uncertain.

(3) The growing-point had shifted to legislation and an efficient organ of legislation had developed.

(4) Usually, there was a need for one law in a political community whose several subdivisions had developed divergent local laws.

4. Codification in Anglo-American law.

In England:

The project under Henry VIII
Bacon's project (1614)
Lord Westbury's plan (1860–1863)
Gradual codification in England:
The Bills of Exchange Act (1882)
The Partnership Act (1890)
The Sale of Goods Act (1894)
"Private codification"

The Anglo-Indian Codes (1837-1882)

In Australia:

The project in Victoria (1878–1882)

In the United States:

The New York Codes (1847–1887)
The Code of Civil Procedure (1848)
Codes based on this are in force in 30 jurisdictions
The draft Civil Code (1862)
The Penal Code (1864, enacted 1887)
The draft Political Code (1865)
The Code of Criminal Procedure (1865)
Throop's Code of Civil Procedure (1876–1880)
All of Field's drafts were adopted in California, North and South Dakota and Montana
The Massachusetts commission (1835)
The Civil Code of Georgia (1860)
The Conference of Commissioners on Uniform State Laws

5. Objections to Codification:

(1) Defects of codes in the past.

(a) The codifiers too often had but superficial knowledge of much of the law they attempted to codify.

(b) Most codes in the past have been drawn too hurriedly.

(2) Savigny's objections:

(a) That the growth of the law is likely to be impeded or diverted into unnatural directions.

(b) That a code made by one generation is likely to project directly or indirectly the intellectual and moral notions of the time into times when such notions have become anachronisms.

(3) Austin's objections to the French code:

(a) That it makes no adequate provision for the incorporation of judicial interpretation from time to time.

(b) That it was not complete and was intended to be eked out by pre-existing law.

6. Purposes of Codification:
   The eighteenth-century idea.
   Bentham's idea.
   The idea of a code as the basis of a juristic new start.
   What a code should attempt.

7. Defects of form in American law:
   (a) Want of certainty.
   (b) Waste of labor entailed by unwieldy form of the law.
   (c) Lack of means of knowledge on the part of those who seek to amend the law.
   (d) Irrationality, due to partial survival of obsolete rules.

8. The need of new premises in American law.

XV. APPLICATION AND ENFORCEMENT OF LAW

Pound, The Enforcement of Law, 20 Green Bag, 401.

Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft; Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft; Fuchs, Recht und Wahrheit in unserer heutigen Justiz; Oertmann, Gesetzeszwang und Richterfreiheit; Rumpf, Gesetz und Richter; Brütt, Die Kunst der Rechtsanwendung; Gmelin, Quousque? Beiträge zur soziologischen Rechtsfindung; Kantorowicz, Rechtswissenschaft und Soziologie, 11 ff.

Pound, The German Movement for Reform in Legal Administration and Procedure (with full bibliography), Bull. Comp. Law Bureau Am. Bar Ass'n, I (1908), 31.

Geny, Méthode d'interprétation; Van der Eycken, Méthode de l'interprétation juridique.

Endemann, Lehrbuch des bürgerlichen Rechts, I, §§ 12, 13; Kohler, Lehrbuch des bürgerlichen Rechts, I, §§ 38–40; Planiol, Manuel élémentaire du droit civil, I, §§ 199–225.

Aristotle, Politics, Bk. III, Chap. 15 (Welldon's transl., pp. 148 ff.); Selden, Table Talk, tit. Equity.

Doctor and Student, Pt. 1, Chaps. 16, 45; Spence, History of the Equitable Jurisdiction of the Court of Chancery, Bk. II, Chap. 1.

Ahrens, Cours de droit naturel (8 ed.), I, 177; Lasson, Rechtsphilosophie, 238–239.

Chalmers, Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15; Phelps, Juridical Equity, § 157 and note.

Pound, Introduction to English Translation of Saleilles, Individualization of Punishment; Saleilles, The Individualization of Punishment (transl. by Mrs. Jastrow), Chap. 9.

1. Analysis of the judicial function:
   (1) Finding the law, ascertaining the legal rule to be applied.
   (2) Interpreting the rule so chosen or ascertained, that is determining its meaning by genuine interpretation.
   (3) Applying to the cause in hand the rule so found and interpreted.

2. The technical and the discretionary in judicial administration: Agencies in legal history for restoring or preserving the balance of the administrative element:
   (1) Fictions.
   (2) Executive dispensing power.
   (3) Interposition of praetor or chancellor on equitable grounds.
   (4) Judicial individualization.

3. Law in books and law in action.

   Pound, Law in Books and Law in Action, 44 Am. Law Rev. 13; Wiel, Public Policy in Western Water Decisions, 1 Cal. Law Rev. 11; Harvey, Some Records of Crime, II, 6–7, note 1; Pound, Inherent and Acquired Difficulties in the Administration of Punitive Justice, Proc. Am. Pol. Sci. Ass'n 1907, 223, 234–238; Stammler, Theorie der Rechtswissenschaft, 130–134.

4. The modes of applying legal rules.
   (1) Analytical.
   (2) Historical.
   (3) Equitable.

5. Individualization of application in Anglo-American law.
   (1) In equity.
   (2) Through the jury.
   (3) Through latitude of application under the guise of choice or ascertainment of a rule.
   (4) In criminal law.
      (a) Through judicial discretion in sentence.
      (b) Through assessment of punishment by juries.
      (c) Through nominal sentence and leaving the duration of punishment, etc., to an administrative board.

7

ANALYSIS OF FUNDAMENTAL CONCEPTIONS

XVI. RIGHTS

Austin, Jurisprudence, Lects. 12, 14–16; Gray, Nature and Sources of the Law, §§ 22–62; Holland, Jurisprudence, Chaps. 7, 8 to Subdiv. I, 9, the paragr. "The state has rights"; Salmond, Jurisprudence, §§ 70–74, 78–85; Pollock, First Book of Jurisprudence (3 ed.), 61–72; Markby, Elements of Law, §§ 73, 146–158; Wigmore, Summary of the Principles of Torts (Cases on Torts, vol. 2, App. A), §§ 4–8; Korkunov, General Theory of Law (transl. by Hastings), §§ 27–29; Gareis, Science of Law (transl. by Kocourek), 31–35; Hearn, Theory of Legal Duties and Rights, Chap. 8; Terry, Leading Principles of Anglo-American Law, §§ 113–138.

Amos, Science of Law, 89–97; Rattigan, Science of Jurisprudence, §§ 11*a* –20*b*; Miller, The Data of Jurisprudence, 131–132; Brown, The Austinian Theory of Law, 192–193.

Schuppe, Begriff des subjektiven Rechts, Chap. 2; Bierling, Kritik der juristischen Grundbegriffe, II, 49–73; Dernburg, Pandekten, I, § 39; Windscheid, Pandekten, I, § 37; Kohler, Lehrbuch des bürgerlichen Rechts, I, §§ 44–46; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 16–20.

Definitions for Discussion and Reference

A power over an object which, by reason of the right, is subjected to the will of the person entitled. — Puchta, Cursus der Institutionen, II, § 207.

That quality in a person which makes it just or right for him either to possess certain things or to do certain actions. — Rutherforth, Institutes of Natural Law, Bk. I, Chap. 2, § 3.

A moral power over others residing in one's self. — Stahl, Philosophie des Rechts (5 ed.), II, 279.

The capacity or power of exacting from another or others acts or forbearances.

A party has a right when another or others are bound or obliged by the law to do or to forbear towards or in regard of him. — Austin, Jurisprudence, Lect. 16.

A capacity in one man of controlling, with the assent and assistance of the state, the actions of others. — Holland, Jurisprudence, Chap. 7.

An interest protected by law. — Jhering, Geist des römischen Rechts, III, § 60.

A moral or natural right is an interest recognised and protected by the rule of natural justice — an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right . . . is an interest recognised and protected by the rule of legal justice — an interest the violation of which would be a legal wrong to him whose interest it is, and respect for which is a legal duty. — Salmond, Jurisprudence, § 72.

A permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right. — Holmes, Common Law, 214.

A relation between persons, concerning an object, created by a particular fact, determined by a principle or rule of law, for an end of human life. — Ahrens, Cours de droit naturel, I, § 23.

A relation sanctioned and protected by the legal order. — Kohler, Einführung in die Rechtswissenschaft, § 6.

There has been a controversy whether right is power or interest. The word suggests both: a power to exact a particular act or forbearance, service, or benefit, and a particular interest on account of which the power exists, from which it derives its value, with respect to which its form is determined, and which it serves to protect. But the right in itself is power. It is related to the interest as the fortification to the protected land. — Merkel, Juristische Encyklopädie (2 ed.), § 159, note.

XVII. POWERS

Salmond, Jurisprudence, § 76; Miller, The Data of Jurisprudence, 63–70; Kohler, Lehrbuch des bürgerlichen Rechts, I, § 48.

Jus disponendi.

Representation.

Power of assignee to sue.

Creation of title by one who has none.
- Powers under the statute of uses.
- Sale in market overt.
- Transfer after unrecorded conveyance.
- Power of disseisor to give title to what he severs from land.
- Sale by trustee or by one who has legal but not equitable ownership.
- Power of tenant without impeachment of waste to become owner of wood cut.

Power of promissor to turn liability to perform into liability for damages.

Self help and self redress.

XVIII. PRIVILEGES

1. Conferred by law:
   - Self defense.
   - Self help.
   - Self redress.
   - Prevention of felony.
   - Arrest for felony, affray etc.
   - Privileges as to speech and writing
     - in legal proceedings,
     - judicial officers,
     - legislative bodies,
     - reports of judicial and legislative proceedings,
     - comment and criticism in case of public officers and candidates,
     - privileged communications.
   - Acts of public officers in certain cases — defense against the public enemy, public peril from fire or flood.
   - Deviation where highway is impassable.

2. Conferred by a legal transaction.

License.

Estate without impeachment of waste.

Meanings of "privilege."

Miller, Data of Jurisprudence, 103–108; Bigelow, Torts (8 ed.), 13–16.

Distinction between a privilege and a right.

Salmond, Jurisprudence, § 75; Brown, The Austinian Theory of Law, 180–181 (note); Bentham, Works (Bowring's ed.), II, 217–218. See Hearn, Theory of Legal Duties and Rights, 133–134.

Objections to "immunity" as a name for this conception.

Compare Skelton *v.* Skelton, 2 Swanst., 170.

Objections to "liberty" as a name for this conception.

As to "liberties" see Salmond, Jurisprudence, § 75; Miller, Data of Jurisprudence, 96–100.

XIX. DUTIES AND LIABILITIES

Austin, Jurisprudence, Lects. 17, 22–26; Holland, Jurisprudence, Chap. 7; Salmond, Jurisprudence, § 77; Gray, Nature and Sources of the Law, §§ 45, 46, 59–61; Korkunov, General Theory of Law (transl. by Hastings), § 29; Hearn, Theory of Legal Duties and Rights, Chap. 4; Miller, The Data of Jurisprudence, Chap. 3; Terry, Leading Principles of Anglo-American Law, §§ 108–112; Bierling, Juristische Prinzipienlehre, I, § 11 (pp. 109–183).

Markby, Elements of Law, §§ 181–190; Pollock, First Book of Jurisprudence (3 ed.), 57-61; Rattigan, Science of Jurisprudence, § 20.

XX. RELATIONS

Wigmore, Summary of the Principles of Torts, §§ 4–8.

Stammler, Theorie der Rechtswissenschaft, 203–207; Savigny, System des heutigen römischen Rechts, I, §§ 52–53; Bierling, Kritik der juristischen Grundbegriffe, II, 128–149; Bierling, Juristische Prinzipienlehre, I, § 12 (pp. 183–206); Puntschart, Die fundamentalen Rechtsverhältnisse des römischen Privatrechts, §§ 7–8.

Korkunov, General Theory of Law (transl. by Hastings), § 22; Windscheid, Pandekten, I, § 37 *a*; Dernburg, Pandekten, I, § 40; Regelsberger, Pandekten, § 13.

XXI. PERSONS

1. The subjects of rights.

(a) In general.

Gray, Nature and Sources of the Law, §§ 63–148; Salmond, Jurisprudence, §§ 109–114; Korkunov, General Theory of Law (transl. by Hastings), § 28; Pollock, First Book of Jurisprudence (3 ed.), 108–126; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), § 30.

Demogue, Notions fondamentales du droit privé, 320–382; Bierling, Juristische Prinzipienlehre, I, § 13; Bierling, Kritik der juristischen Grundbegriffe, II, 74–85; Windscheid, Pandekten, I, § 49.

Miller, Lectures on the Philosophy of Law, Lect. 11; Lasson, System der Rechtsphilosophie, § 41.

(b) Natural persons.

Holland, Jurisprudence, Chap. 8, Subdiv. I to ii; Markby, Elements of Law, §§ 131–135; Capitant, Introduction à l'étude du droit civil (3 ed.), 103–142; Dernburg, Pandekten, I, § 50; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 24–39.

(c) Juristic persons.

Salmond, Jurisprudence, §§ 115–120; Holland, Jurisprudence, Chap. 8, Subdiv. I, ii; Markby, Elements of Law, §§ 136–145; Gierke, Political Theories of the Middle Age, Maitland's Introduction, pp. xviii-xliii; Gareis, Science of Law (transl. by Kocourek), 104–106; Machen, Corporate Personality, 24 Harvard Law Rev. 253, 347.

Bierling, Kritik der juristischen Grundbegriffe, II, 85–118; Zitelmann, Begriff und Wesen der sogenannten juristischen Personen; Hölder, Natürliche und juristische Personen; Binder, Das Problem der juristischen Persönlichkeit; Rümelin, Methodistisches ueber juristische Personen; Dernburg, Pandekten, I, § 59; Windscheid, Pandekten, I, § 57; Kohler, Lerhbuch des deutschen bürgerlichen Rechts, I, § 131.

Capitant, Introduction à l'étude du droit civil (3 ed.), 158–184; Vareilles-Sommières, Les personnes morales; Jusserand, Essai sur la proprieté collective, Livre du centennaire du code civil, I, 357; Saleilles, De la personalité juridique, histoire et théorie.

2. Personality.

Savigny, Jural Relations (transl. by Rattigan) § 75; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.) §§ 35–36: Blackstone, Commentaries, I, 132; Town of Baltimore *v.* Town of Chester, 53 Vt. 315; *In re* Nerac, 35 Cal. 392; Avery *v.* Everett, 110 N. Y. 317.

3. Capacity.

Maine, Ancient Law (Pollock's ed.), 172–174 and Sir Frederick Pollock's note L (pp. 183–185); Holland, Jurisprudence, Chap. 14, Subdiv. II; Ehrlich, Die Rechtsfähigkeit.

(a) Status.

Austin, Jurisprudence, Lects. 40–42; Kohler, Lehrbuch der Rechtsphilosophie, 62–66.

(b) Capacity for { rights, / legal transactions, / civil liability for acts, / criminal responsibility.

Gareis, Science of Law (transl. by Kocourek), 103; Dernburg, Pandekten, I, §§ 52–58; Windscheid, Pandekten, I, §§ 54–56; Capitant, Introduction à l'étude du droit civil (3 ed.), 143–156.

Definitions of Status

Status is a characteristic by virtue of which a man has certain rights. — Savigny, System des heutigen römischen Rechts, II, 444.

The position of men in the law. — Puchta, Cursus der Institutionen, II, § 210.

Whenever a set of rights and duties, capacities and incapacities, regards specially and constantly one class of persons, every person of that class has a status or condition. . . . The marks of a status or condition are these: first, it resides in a person as a member of *class*. Second, the rights and duties, capacities and incapacities, composing the status or condition, regard or interest

specially the persons of that class. Thirdly, these rights and duties, capacities and incapacities, are so considerable in number that they give a conspicuous character to the individual, or extensively influence his relations with other members of society. — Austin, Jurisprudence, Lect. 40.

That peculiar condition of a person whereby what is law for the average citizen is not law for him. — Westlake, Private International Law (1 ed.), § 89.

A person's capacity for the acquisition and exercise of legal rights and for the performance of legal acts. — Dicey, Conflict of Laws, 474.

The status of an individual, used as a legal term, means the legal position of the individual in, or with regard to, the rest of the community. — Brett, L. J., Niboyet *v.* Niboyet, 4 P. Div. (Eng.), 1.

XXII. ACTS

Austin, Jurisprudence, Lects. 19–21; Holland, Jurisprudence, Chap. 8, Subdiv. 3; Salmond, Jurisprudence, §§ 120–124, 133–144; Pollock, First Book of Jurisprudence (3 ed.), 139–167; Markby, Elements of Law, §§ 213–274.

Rattigan, Science of Jurisprudence, §§ 29–63; Hegel, Philosophy of Right (transl. by Dyde), §§ 115–126.

1. Conception and definition.

   Salmond, Jurisprudence, § 128; Terry, Leading Principles of Anglo-American Law, §§ 77–81; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, § 216.

2. Elements.

   Salmond, Jurisprudence, § 128.

3. Representation.

   Dernburg, Pandekten, I, §§ 117–119; Windscheid, Pandekten, I, §§ 73–74; Capitant, Introduction à l'étude du droit civil (3 ed.), 330–337.

4. Legal transactions.

   Salmond, Jurisprudence, §§ 121–123; Terry, Leading Principles of Anglo-American Law, §§ 172–180; Dernburg, Pandekten, I, §§ 91–96; Kohler, Lehrbuch des deutschen

bürgerlichen Rechts, I, §§ 217–225; Capitant, Introduction à l'étude du droit civil (3 ed.), 245–259.

(a) Conception.

Karlowa, Das Rechtsgeschäft; Windscheid, Pandekten, I, § 69.

(b) Form.

Dernburg, Pandekten, I, §§ 97–98; Windscheid, Pandekten, I, § 72; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 235–237.

(c) Avoidance.

Dernburg, Pandekten, I, §§ 99–104; 120–122; Windscheid, Pandekten, I, §§ 78–80; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 227–234; Capitant, Introduction à l'étude du droit civil (3 ed.) 260–275, 284–309.

(d) Qualifications.

Dernburg, Pandekten, I, §§ 105–116; Windscheid, Pandekten, I, §§ 86–100; Kohler, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 249–252; Capitant, Introduction à l'étude du droit civil (3 ed.), 309–330.

On conditions, see particularly Langdell, Summary of the Law of Contracts, §§ 26–31.

5. Wrongful Acts.

Salmond, Jurisprudence, §§ 133–141; Salmond, The Principles of Civil Liability, Essays in Jurisprudence and Legal History 123–170; Holmes, Common Law, Lects. III, IV.

See Hasse, Die Culpa des römischen Rechts.

(a) Causation.

Wigmore, Summary of the Principles of Torts, §§ 160–201; Smith, Legal Cause in Actions of Tort, 25 Harv. Law Rev. 103.

Müller, Der Kausalzusammenhang; Horn, Kausalitätsbegriff im Straf- und Zivilrecht; Rümelin, Verwendung der Kausalbegriffe im Straf und Zivilrecht; Endemann, Lehrbuch des bürgerlichen Rechts, I, § 129.

(b) Responsibility: Imputation.

Salmond, Jurisprudence, § 149; Terry, Leading Principles of Anglo-American Law, §§ 87–88.

XXIII. THINGS

Austin, Jurisprudence, Lect. 13; Holland, Jurisprudence, Chap. 8, Subdiv. II; Markby, Elements of Law, §§ 126–130; Pollock, First Book of Jurisprudence (3 ed.), 127–138; Korkunov, General Theory of Law (transl. by Hastings), § 30; Gareis, Science of Law (transl. by Kocourek), § 19.

Dernburg, Pandekten, I, § 67; Windscheid, Pandekten, I, §§ 42, 137–144; Birkmeyer, Das Vermögen im juristischen Sinn; Bierling, Juristische Prinzipienlehre, I, § 14 (pp. 239–273); Capitant, Introduction à l'étude du droit civil (3 ed.) 215–240.

Hegel, Philosophy of Right (transl. by Dyde), § 41–44; Ahrens, Cours du droit naturel, II, § 54; Kohler, Lehrbuch der Rechtsphilosophie, 81–86.

8

THE SYSTEM OF LAW

XXIV. DIVISION AND CLASSIFICATION

Austin, Jurisprudence, Lects. 43–47; Holland, Jurisprudence, Chap. 9, last par. of Chap. 7; Salmond, Jurisprudence, §§ 79, 81–83, 85, 86; Markby, Elements of Law, §§ 162–166; Pollock, First Book of Jurisprudence (3 ed.), 81–107; Korkunov, General Theory of Law (transl. by Hastings), §§ 32–34; Gareis, Science of Law (transl. by Kocourek), § 14.

Classifications for Discussion and Reference

Gaius.
- Public law.
- Private law.
  - Persons.
  - Things.
  - Actions.

Modern Roman law (German).
- Public law.
- Criminal law.
- Private law.
  - General part.
    - Persons.
    - Things.
    - Legal transactions.
    - Exercise and protection of rights.
    - Self help and self redress.
  - Special part.
    - Law of property.
    - Law of obligations.
    - Family law.
    - Law of inheritance.

French Civil Code (1804).
- Persons.
- Property.
  - Modes of acquiring ownership.

Succession.
Gifts *inter vivos* and wills.
Contracts.
Quasi contract.
Torts.
Marriage.
Sale, exchange, bailment.
Partnership.
Agency.
Pledge and mortgage.

German Civil Code (1900).
General principles.
Persons { natural. / juristic.
Things.
Legal transactions.
Computation of time.
Prescription.
Exercise of rights.
Law of obligations.
Law of things.
Family law.
Law of inheritance.

Blackstone.
Rights of persons.
Rights of things.
Private wrongs.
Public wrongs.

Committee on Classification of Law, American Bar Association (1902).
Municipal law.
Persons.
Public.
Private.
Several classes, i.e., citizens, aliens, corporations, etc.
Civil rights.
Domestic relations.

Things.
Personal.
Real.
Actions.
Crimes and criminal procedure.
International law.
Public.
Private (Rep. Am. Bar Ass'n XXV, 474–5, 1902).

Practical common law classification.
(Century Digest, 1898).
Law of
(1) Persons.
(2) Property.
(3) Contracts.
(4) Torts.
(5) Crimes.
(6) Remedies.
(7) Government.

Gareis.
Private law.
Law of things.
Rights relating to material things.
Rights in one's own property.
Iura in re aliena.
Rights relating to incorporeal things.
Mixed law of persons and law of things.
Law of inheritance.
Law of family property, i.e., property rights between husband and wife, parent and child, etc.
Law of persons.
Family law, i.e., marriage, parent and child, etc., except as to property rights.
Law of obligations.
Public law.
Law of the state.
Constitutional law.
Administrative law.
International law (Encyklopädie der Rechtswissenschaft, 1 ed. 188).

Kohler.
- Law relating to persons.
  - Law of persons.
  - Law of obligations.
- Law relating to natural objects.
- Hence:
  - Law of persons.
  - Law of property (including inheritance).
  - Law of obligations (Einführung in die Rechtswissenschaft, § 6).

Cosack (1910).
- General part.
  - The holder of rights.
  - The objects of rights.
  - The origination, modification and termination of rights.
    - Legal transactions.
    - Culpability and casualty.
    - Lapse of time.
    - Exercise of governmental power.
  - Exercise and securing of rights.
- Special part.
  - Law of claims to performance.
  - Law of things.
  - Law of commercial paper.
  - Law of associations.
  - Law of juristic persons.
  - Family law.
  - Law of inheritance.

XXV. PROPRIETARY RIGHTS: POSSESSION

Pollock, First Book of Jurisprudence (3 ed.), 168–195; Salmond, Jurisprudence, §§ 94–107; Holland, Jurisprudence, Chap. 11, Subdiv. V to "ownership"; Markby, Elements of Law, §§ 347–399; Pollock and Wright, Essay on Possession in the Common Law, Introduction; Holmes, Common Law, Lect. 6.

Dernburg, Pandekten, I, §§ 169, 172–183; Windscheid, Pandekten, I, § 148; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, §§ 185–194.

The literature upon the nature and elements of possession is very extensive. The following are the chief authorities: Savigny, Recht des Besitzes (7 ed.

by Rudorff); Bruns, Recht des Besitzes im Mittelalter und in der Gegenwart; Bekker, Recht des Besitzes bei den Römern; Jhering, Der Besitzwille; Kuntze, Zur Besitzlehre; Stintzing, Der Besitz; Vermond, Théorie générale de la possession; Cornil, Possession dans le droit romain.

Nature of proprietary rights in general.
Relation of possession to ownership.
Importance of theory of possession
in Roman law,
in the common law.

The conception of possession.
Law or fact?

The elements of possession.
1. Physical (*corpus*).
2. Mental (*animus*).
The physical element (*naturalis possessio*, detention, custody, *Inhabung*).
The mental element (juristic possession).
Difference between Roman and Germanic theories.
Animus domini.
Animus rem sibi habendi.
Animus possidendi.
Must it be a claim to use on one's own behalf?
Servants and agents.

Mediate possession.
Representative — through agent or servant.
Through bailee — subject to demand.
— for fixed term or subject to condition.

Derivative possession.

Possession is a matter of law and of fact equally. . . . Possession is a matter of fact in so far as a non-juridical conception of pure fact (detention) lies at its foundation. . . . But possession is a matter of law in so far as legal rights are bound up with the bare existence of a conception of fact. — Savigny, Recht des Besitzes, § 5.

To possess a thing means to have it in one's actual control. This actual control may have a foundation in right and law or

not; for the conception of possession this is indifferent. When we speak of possession, we look away from the law. But while possession is no right it has legal consequences. — Windscheid, Pandekten, I, § 148.

It is merely a state of things, a fact, a mere *de facto* relation to a thing into which a man has brought himself; which, however, inasmuch as it may under certain circumstances bring about a right to the thing, enjoys in itself the protection of the law. — Wächter, Pandekten, § 122 (transl. by Moyle, Institutes, 2 ed. 336).

Possession is no right, but a matter of fact. But it may be (a) the consequence of rights . . . [e.g., ownership]; (b) the originating cause of rights . . . [e.g., usucapion, adverse possession]; (c) in certain cases the mere matter of fact of possession is protected against disturbance. — Gareis, Encyklopädie der Rechtswissenschaft, § 17.

What is the ground of this protection? Must we not say that if possession is no right, its violation is no violation of right, and hence affords no ground for its protection? — Bruns in Holtzendorff, Encyklopädie der Rechtswissenschaft (5 ed.), 473.

There has been much learned discussion of the question whether possession is a fact or a right. No doubt it differs from ownership in requiring a *de facto* relation between a person and an object, and to that extent it is a fact. But there is no doubt also that it has legal consequences, and if that is so it seems to be little less than quibbling to say it is not a right as well. — Moyle, Institutes (2 ed.), 336.

Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives anyone special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denotes such a group of facts connotes the rights attached to it by way of legal conse-

quences, and any word which denotes the rights attached to a group of facts connotes the group of facts in like manner.

The word " possession " denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey directly or by implication that the law will give him the advantage of the situation. Contract or property or any other substantive notion of the law, may be analyzed in the same way, and should be treated in the same order. The only difference is that, while possession denotes the facts and connotes the consequence, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts. — Holmes, Common Law, 214–15.

XXVI. PROPRIETARY RIGHTS: OWNERSHIP

1. Conception and definition.

Austin, Jurisprudence, concluding portion of Lect. 47, Lect. 48; Salmond, Jurisprudence, § 152; Markby, Elements of Law, §§ 307–314.

Dernburg, Pandekten, I, §§ 192, 198; Windscheid, Pandekten, I, §§ 167–168; Gareis, Science of Law (transl. by Kocourek), 139–144.

The common-law doctrine of estates.

Markby, Elements of Law, § 333; Terry, Leading Principles of Anglo-American Law, § 45.

2. Analysis.

Markby, Elements of Law, §§ 307–345; Hearn, Theory of Legal Duties and Rights, Chap. 10, § 1.

Incidents of ownership:

Jus possidendi.
Jus utendi.
Jus fruendi.
Jus abutendi.
Jus disponendi.
Jus prohibendi.

3. Acquisition of ownership.

Holland, Jurisprudence, Chap. 11 (from par. " commencement of the right " to par. " divestive facts "); Salmond, Jurisprudence, §§ 175–178; Dernburg, Pandekten, I, § 201.

- Roman law
  - Original
    - Accretion (*alluuio*).
    - Occupation
      - *res nullius.*
      - *res derelictae.*
      - *res hostiles.*
      - *thesaurus.*
    - Confusion.
    - Accession.
    - Specification.
    - *Fructus perceptio.*
    - Adverse possession (prescription).
  - Derivative
    - Delivery (*traditio*).
    - Adjudication.
    - Entry upon inheritance.
    - *Legatum* (gift by will).
- Common law
  - Original
    - Occupancy
      - [goods of an alien enemy].
      - abandoned chattels.
      - wild animals.
      - fruits of land.
    - Accretion.
    - Sale for taxes.
    - Sale under judgment *in rem* (e.g. for forfeiture under revenue laws).
    - Adverse possession.
    - Accession.
    - Confusion.
  - Derivative
    - Judgment.
    - Marriage.
    - Bankruptcy.
    - Succession
      - intestate.
      - testamentary
    - Gift.
    - Sale.
    - Conveyance.

4. Loss of ownership.
   Salmond, Jurisprudence, § 179.

5. *Jura in re aliena.*

Austin, Jurisprudence, Lect. 52; Salmond, Jurisprudence, § 83.

(a) Servitudes:

Austin, Jurisprudence, Lects. 49–50; Holland, Jurisprudence, Chap. 11, par. "servitudes"; Salmond, Jurisprudence, § 159; Markby, Elements of Law, §§ 400–430; Dernburg, Pandekten, I, §§ 235–238.

i. Personal

- Roman law
  - *usus.*
  - *usus fructus.*
  - *habitatio*
  - *operae seruorum.*
- Common law
  - leases (see Salmond, § 159).
    - In theory of our law leases belong elsewhere.
  - profits in gross.

ii. Real.

- Roman law
  - Rustic
    - rights of way.
    - rights of conducting water over land.
    - rights of drawing water from land.
  - Urban
    - *seruitus altius non tollendi.*
    - *tigni immittendi.*
    - *oneris ferendi.*
    - *stillicidii.*
- Common law
  - easements.
  - profits appurtenant.
  - covenants running with the land.
  - equitable servitudes.

(b) Securities (liens).

Salmond, Jurisprudence, § 160; Holland, Jurisprudence, Chap. 11, par. "pledge"; Markby, Elements of Law, §§ 443–481; Dernburg, Pandekten, I, §§ 261–262; Windscheid, Pandekten, I, §§ 225–228.

- Roman law
  - *fiducia.*
  - *pignus.*
  - *hypotheca*
    - tacit.
    - conventional.
  - *antichresis.*
- The Civil Law
  - contractual
    - pledge.
    - hypothecation
      - general.
      - particular.
  - by operation of law
    - general
      - in favor of the fisc.
      - against a guardian.
      - for *dos* and paraphernalia.
    - particular
      - landlord's lien.
      - for money loaned to rebuild a building.
      - in favor of a pupil upon a thing acquired with his money.
      - in favor of a legatee against the heir who has withheld something from the inheritance.
- Common law
  - pledge.
  - mortgage.
  - common law liens.
  - statutory liens.
  - equitable charges or liens.

XXVII. OBLIGATIONS

1. History.

Maine, Ancient Law, Chap. 9 and Sir Frederick Pollock's Note R; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Enzyklopädie der Rechtswissenschaft, 6 or 7 ed.), §§ 28–37.

2. Conception and definition.

Holland, Jurisprudence, Chap. 12 to Subdiv. I; Salmond, Jurisprudence, § 165; Dernburg, Pandekten, II, §§ 1–3; Windscheid, Pandekten, II, §§ 252–253; Capitant, Introduction à l'étude du droit civil (3 ed.), 89–97.

3. Classification.

Salmond, Jurisprudence, § 167; Holland, Jurisprudence, Chap. 12, par. before Subdiv. I; Sohm, Institutes of Roman Law (transl. by Ledlie, 2 ed.), § 77; Gareis, Science of Law (transl. by Kocourek), 175.

- Roman law
  - Contractual
    - *Ex contractu.*
    - *Quasi ex contractu.*
  - Delictual
    - *Ex delicto.*
    - *Quasi ex delicto.*
- Common law
  - Arising from legal transactions
    - contract.
    - express trust.
  - Arising from office or calling.
  - Arising from fiduciary relations.
  - Imposed by law to prevent unjust enrichment.

Is the Roman conception of obligations *ex delicto* expedient for our purposes?

4. Analysis of contract.

Salmond, Jurisprudence, §§ 122–124; Holland, Jurisprudence, Chap. 12, Subdiv. II to par. "principles of classification"; Markby, Elements of Law, §§ 603–624, 626–648, 651–658, 663; Windscheid, Pandekten, II, §§ 305–318; Dernburg, Pandekten, II, §§ 9–11.

(a) Parties.
(b) Declaration of will.
(c) Presupposition.
(d) Form.

"Abstract" promises.

Salmond, Jurisprudence (3 ed.), 321–323; Dernburg, Pandekten, II, § 22; Windscheid, Pandekten, II, §§ 318, 319, 364.

Contracts for the benefit of a third person.

Hellwig, Verträge auf Leistung an Dritte, §§ 24, 40; Dernburg, Pandekten, II, § 18; Windscheid, Pandekten, II, § 316; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 162; Baudry-Lacantinerie, Précis du droit civil, II, § 908.

Plurality of parties.

Salmond, Jurisprudence, § 166; Dernburg, Pandekten, II, §§ 69–75; Windscheid, Pandekten, II, §§ 292–300; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 118–119; Baudry-Lacantinerie, Précis du droit civil, §§ 964–1002.

5. Classification of contracts.

(a) With respect to form.

- Roman law
  - Formal
    - verbal.
    - literal.
  - Real
    - *mutuum.*
    - *commodatum.*
    - *depositum.*
    - *pignus.*
  - Consensual
    - sale.
    - letting and hiring.
    - partnership.
    - mandate.
  - Innominate
    - *do ut des.*
    - *do ut facias.*
    - *facio ut des.*
    - *facio ut facias.*
  - Actionable pacts
    - *pacta adiecta.*
    - *pacta praetoria.*
    - *pacta legitima.*
- Common law
  - Formal
    - instruments under seal.
    - mercantile specialties.
  - Real
    - debt.
    - bailment.
  - Simple.

(b) With respect to subject-matter.

See Holland, Jurisprudence, Chap. 12, par. "rights resulting from a contract" to par. "transfer."

6. Transfer of obligations.

Holland, Jurisprudence, Chap. 12, par. "transfer" to par. "extinction"; Markby, Elements of Law, §§ 659–672; Dernburg, Pandekten, II, §§ 47–53; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 114–117; Planiol, Traité élémentaire du droit civil, II, §§ 389–398.

7. Extinction of obligations.

Holland, Jurisprudence, Chap. 12, par. "extinction" to end of chapter; Dernburg, Pandekten, II, §§ 64–68; Windscheid, Pandekten, II, §§ 341–361; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 102–113; Planiol, Traité élémentaire du droit civil, II, §§ 399–400, 522–523, 529–609, 617–629.

Obligation

The relation of one person to another whereby the one person is bound either to some performance or to forbear something. — Kohler, Einführung in die Rechtswissenschaft, § 28.

An obligatory right . . . is a right to require another person to do some act which is reducible to a money value. It is invariably directed against a determinate person. . . . Obligations are not designed to create any general control over all the acts of the debtor. A debtor can, in the last resort, rid himself of every obligation by sacrificing a corresponding portion of his property for the purpose of indemnifying his adversary. An obligation means a deduction, not from a man's liberty, but only from his property. — Sohm, Institutes of Roman Law (Ledlie's transl.), § 60.

Contract

An expressed agreement of the wills of two or more persons for the purpose of producing an alteration in their spheres of rights. — Gareis, Encyklopädie der Rechtswissenschaft, § 23.

The declared agreement of two or more persons who desire to enter into an obligatory relation concerning an object of right. — Ahrens, Cours de droit naturel, II, § 82.

The mutually expressed agreement of certain persons over a relation of law to be created between them. — Stahl, Philosophie des Rechts (5 ed.), II, 412.

XXVIII. TORTS

Holland, Jurisprudence, Chap. 13, par. "origin" to par. "transfer"; Terry, Leading Principles of Anglo-American Law, §§ 524–541; Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. Law Rev. 315, 383, 441, The Tripartite Division of Torts, 8 Harv. Law Rev. 200, A General Analysis of Tort Relations, 8 Harv. Law Rev. 377, Cases on Torts, Preface; Bigelow, Torts (8 ed.), 35–39; Salmond, Torts, §§ 1–14.

Dernburg, Pandekten, II, § 129; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, §§ 163–164; Baudry-Lancantinerie, Précis du droit civil, II, §§ 1346–1367.

- Roman law
  - Delicts
    - Wrongful appropriation of property
      - *furtum*
      - *rapina.*
    - Injury to corporeal property
      - *damnum iniuria datum.*
    - Injuries to personality
      - to the physical person or to honor, *iniuria.*
    - Injuries to personality whereby substance is impaired
      - *dolus*
      - *metus.*
  - Quasi Delicts
    - Liability of *iudex* who "makes a case his own."
    - Liability *de deiectis et diffusis.*
    - Noxal liability.
    - Liability under the aedilician edict.

XXIX. EXERCISE AND ENFORCEMENT OF RIGHTS

1. Exercise of rights.

See references in III, A, 5, i. Also Blümner, Lehre von böswilligen Rechtsmissbrauch.

2. Self help, self redress.

Dernburg, Pandekten, I, § 125; Windscheid, Pandekten, I, § 123; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 78.

3. Private execution.

Demogue, Notions fondamentales du droit privé, 638–669.

4. Administrative enforcement.

Gareis, Science of Law (transl. by Kocourek), § 53; Goodnow, Comparative Administrative Law, I, 1–24, II, 127–129; Amos, Science of Law (2 ed.), 396–397.

5. Judicial Enforcement: Procedure.

Holland, Jurisprudence, Chap. 15; Salmond, Jurisprudence, §§ 172–176; Markby, Elements of Law, §§ 848–863; Amos, Science of Law, Chap. 11; Gareis, Science of Law (transl. by Kocourek), § 50; Hell, Systematik des römischen und deutschen Privatrechts, 46–62.

Storey, The Reform of Legal Procedure; Pound, Some Principles of Procedural Reform, 4 Ill. Law Rev. 388, 491; Report of the Board of Statutory Consolidation for the State of New York on a Plan for the Simplification of the Civil Practice in the Courts of that State; Prozessreform, Vier Beiträge von A. Mendelssohn-Bartholdy, G. Chiovenda, Roscoe Pound and A. Tissier, Rheinische Zeitschrift für Zivil-und Prozessrecht, II, Heft 4.

(a) The mode of instituting the proceeding.

Windscheid, Pandekten, I, §§ 124–126.

(b) Ascertainment of the facts.

(i) Pleading.

Dernburg, Pandekten, I, §§ 151–152; Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 356–392; Hellwig, Lehrbuch des deutschen Zivilprozessrechts, III, §§ 141–146; Lewinski, Courts and Procedure in Germany, 5 Ill. Law Rev. 193.

(ii) Proof: Trial and finding.

Wigmore, Principles of Judicial Proof. Reference may be made to Gross, Criminal Investigation (transl. by Adam); Arnold, Psychology as Applied to Legal Evidence; de la Grasserie, La Preuve; Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 401–475.

(c) Judgment:

Windscheid, Pandekten, I, §§ 128–132.

The remedy { prevention. / specific redress. / substitutional redress.

Dernburg, Pandekten, I, §§ 139–143, 167–168.

(d) Execution.

Garsonnet et Cézar-Bru, Précis de procédure civile, §§ 703–718.